TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 138.

JAMES J. RAFFERTY, COLLECTOR OF INTERNAL REVENUE FOR THE PHILIPPINE ISLANDS, PETITIONER,

vs.

SMITH, BELL & COMPANY, LIMITED.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

PETITION FOR CERTIORARI FILED SEPTEMBER 15, 1920.

CERTIORARI AND RETURN FILED MARCH 9, 1921.

(27,901)

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1 THE UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands, (Appellate Jurisdiction).

G. R. No. 14466.

SMITH, BELL & COMPANY, LIMITED, Plaintiff and Appellant,

versus

JAMES J. RAFFERTY, Collector of Internal Revenue for the Philippine Islands, Defendant and Appellant.

Concerning Amount of Money.

Be it remembered that, on the dates respectively mentioned, the following proceedings were had in the above-entitled case, to wit:
On February 7, 1918, the plaintiff by its attorneys filed with the office of the Clerk of the Court of First Instance of Manila, Ninth Judicial District, the following complaint:

2 UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance for the City of Manila.

(Case No. 15842.)

SMITH, BELL & COMPANY, LIMITED, Plaintiff,

versus

JAMES J. RAFFERTY, Collector of Internal Revenue for the Philippine Islands, Defendant.

Complaint.

Comes now plaintiff, and, for its cause of action against defendant, alleges:

I.

That plaintiff is a corporation duly organized and existing under the laws of the Philippine Islands and domiciled in the City of Manila; that defendant is the duly appointed and acting Collector of Internal Revenue for the Philippine Islands;

II.

That, during the period from October 1, 1916, to December 31, 1916, plaintiff sold and exported, from the Philippine Islands to various persons and firms without the Philippine Islands,
3 merchandise, the produce of the Philippine Islands, of the value of four Million Eight Hundred and Fifty-three Thousand Two Hundred and Thirty-six Pesos (₱4,853,236.00);

III.

That defendant, in his capacity as Collector of Internal Revenue for the Philippine Islands, and under the pretended authority of section 1614 of Act No. 2657 of the Philippine Legislature, demanded of plaintiff a tax of one per centum (1%) of the value of the said merchandise, to wit, the sum of Forty-eight Thousand Five Hundred and Thirty-two Pesos and Thirty-six Centavos (₱48,532.36);

IV.

The plaintiff involuntarily, and to avoid the exaction of penalties for non-payment, on the 18th day of January, 1917, paid to defendant the sum of Forty-eight Thousand Five Hundred and Thirty-two Pesos and Thirty-six Centavos (₱48,532.36) demanded by him, under written protest on the ground that the said tax was a tax on exports from the Philippine Islands the levy or collection of which was prohibited by the provisions of the Act of Congress of August 29, 1916, known as the Jones Law, and at the same time notified the defendant that, if the said sum paid under protest were not returned, suit would be brought for its recovery;

4 V.

That defendant refused, and still refuses, to return to plaintiff the said sum of Forty-eight Thousand Five Hundred and Thirty-two Pesos and Thirty-six Centavos (₱48,532.36).

For a second cause of action against defendant, plaintiff:

I.

Adopts the allegations contained in the first paragraph of its first cause of action, and further alleges:

II.

That, during the period from January 1, 1917, to March 31, 1917, plaintiff sold and exported, from the Philippine Islands to various persons and firms without the Philippine Islands, merchandise, the produce of the Philippine Islands, of the value of Five Million Eight

Hundred and Eighty-four Thousand Four Hundred and Thirty-eight Pesos (₱5,884,438.00);

III.

That defendant, in his capacity as Collector of Internal Revenue for the Philippine Islands, and under the pretended authority of section 1614 of Act No. 2657 of the Philippine Legislature, demanded of plaintiff a tax of one per centum (1%) of the value of the said merchandise, to wit, the sum of Fifty-eight Thou-
5 sand Eight Hundred and Forty-four Pesos and Thirty-eight Centavos (₱58,844.38);

IV.

That plaintiff involuntarily, and to avoid the exaction of penalties for non-payment, on the 19th day of April, 1917, paid to defendant the sum of Fifty-eight Thousand Eight Hundred and Forty-four Pesos and Thirty-eight Centavos (₱58,844.38) demanded by him, under written protest on the ground that the said tax was a tax on exports from the Philippine Islands the levy or collection of which was prohibited by the provisions of the Act of Congress of August 29, 1916, known as the Jones Law, and at the same time notified the defendant that, if the said sum paid under protest, were not returned, suit would be brought for its recovery;

V.

That defendant refused, and still refuses, to return to plaintiff the said sum of Fifty-eight Thousand Eight Hundred and Forty-four Pesos and Thirty-eight Centavos (₱58,844.38).

For a third cause of action against defendant, plaintiff:

I.

Adopts the allegations contained in the first paragraph of its first cause of action, and further alleges:

6 II.

That, during the period from the 1st day of April, 1917, to the 30th day of June, 1917, plaintiff sold and exported, from the Philippine Islands to various persons and firms without the Philippine Islands, merchandise, the produce of the Philippine Islands, of the value of Nine Million Four Hundred and Six Thousand Seven Hundred and Fifty Pesos (₱9,406,750.00);

III.

That defendant, in his capacity as Collector of Internal Revenue for the Philippine Islands, and under the pretended authority of sec-

tion 1614 of Act No. 2657 of the Philippine Legislature, demanded of plaintiff a tax of one per centum (1%) of the value of the said merchandise, to wit, the sum of Ninety-Four Thousand and Sixty-seven Pesos and Fifty Centavos. (₱94,067.50);

IV.

That plaintiff involuntarily, and to avoid the exaction of penalties for non-payment, on the 19th day of July, 1917, paid to defendant the sum of Ninety-four Thousand and Sixty-seven Pesos and Fifty Centavos (₱94,067.50) demanded by him, under written protest on the ground that the said tax was a tax on exports from the Philippine Islands the levy or collection of which was prohibited by the provisions of the Act of Congress of August 29, 1916, known
7 as the Jones Law, and at the same time notified defendant that, if the said sum paid under protest were not returned, suit would be brought for its recovery;

V.

That defendant refused, and still refuses, to return to plaintiff the said sum of Ninety-four Thousand and Sixty-seven Pesos and Fifty Centavos (₱94,067.50).

For a fourth cause of action against defendant, plaintiff:

I.

Adopts the allegations contained in the first paragraph of its first cause of action, and further alleges:

II.

That, during the period from the first day of July, 1917, to the 30th day of September, 1917, plaintiff sold and exported from the Philippine Islands to various persons and firms without the Philippine Islands, merchandise, the produce of the Philippine Islands, of the value of Ten Million Five Hundred and Twenty-seven Thousand Two Hundred and Nineteen Pesos (₱10,527,219.00);

III.

That defendant, in his capacity as Collector of Internal
8 Revenue for the Philippine Islands, and under the pretended authority of section 1614 of Act No. 2657 of the Philippine Legislature, demanded of plaintiff a tax of one per centum (1%) of the value of the said merchandise, to wit, the sum of One Hundred and Five Thousand Two Hundred and Seventy-two Pesos and Nineteen Centavos (₱105,272.19);

IV.

That plaintiff involuntarily, and to avoid the payment of penalties for non-payment, on the 19th day of October, 1917, paid to the defendant the sum of One Hundred and Five Thousand Two Hundred and Seventy-two Pesos and Nineteen Centavos (₱105,272.19) demanded by him under written protest on the ground that the said tax was a tax on exports from the Philippine Islands the levy or collection of which was prohibited by the provisions of the Act of Congress of August 29, 1916, known as the Jones Law, and at the same time notified defendant that, if the said sum paid under protest were not returned, suit would be brought for its recovery;

V.

That defendant refused, and still refuses, to return to plaintiff the said sum of One Hundred and Five Thousand Two Hundred and Seventy-two Pesos and Nineteen Centavos (₱105,272.19).

9 For a fifth cause of action against defendant, plaintiff:

I.

Adopts the allegations contained in the first paragraph of its first cause of action, and further alleges:

II.

That, during the period from the first day of October, 1917, to the 31st day of December, 1917, plaintiff sold and exported, from the Phillipine Islands to various persons and firms without the Philippine Islands, merchandise, the produce of the Philippine Islands, of the value of Ten Million Six Hundred and Forty-six Thousand Three Hundred and Sixty-two Pesos (₱10,646,362.00);

III.

The defendant, in his capacity as Collector of Internal Revenue for the Philippine Islands, and under the pretended authority of section 1459 of Act No. 2711 of the Philippine Legislature, demanded of plaintiff a tax of one per centum (1%) of the value of the said merchandise, to wit, the sum of One Hundred and Six Thousand Four Hundred and Sixty-three Pesos and Sixty-two Centavos (₱106,463.62);

IV.

10 That plaintiff involuntarily, and to avoid the payment of penalties for non-payment, on the 18th day of January, 1918, paid to defendant the sum of One Hundred and Six Thousand Four Hundred and Sixty-three Pesos and Sixty-two Centavos (₱106-463,62) demanded by him, under written protest on the ground that

the said tax was a tax on exports from the Philippine Islands the levy or collection of which was prohibited by the provisions of the Act of Congress of August 29, 1916, known as the Jones Law, and at the same time notified defendant that, if the said sum paid under protest were not returned, suit would be brought for its recovery;

V.

That defendant refused, and still refuses, to return to plaintiff the said sum of One Hundred and Six Thousand Four Hundred and Sixty-three Pesos and Sixty-two Centavos (₱106,463.62).

Wherefore plaintiff prays that it have judgment against defendant for the sum of Four Hundred and Thirteen Thousand One Hundred and Eighty Pesos and Five Centavos (₱413,180.05), with interest and costs of this suit.

Manila, P. I., February 7, 1918.

LAWRENCE & ROSS,
(Sgd.) By J. G. LAWRENCE,
Attorneys for Plaintiff.

11 On February 27, 1918, the Solicitor-General for the Philippine Islands entered his appearance in the case as attorney for the defendant.

Thereafter, on March 21, 1918, the defendant, by his attorney the Solicitor-General, filed a demurrer to the complaint based on the ground that it did not state facts sufficient to constitute a cause of action against the defendant which demurrer was answered by the plaintiff, through its attorneys, on March 22 of the same year.

On May 4, 1918, the Honorable James A. Ostrand, Judge of the Court of First Instance of Manila, issued an order overruling the said demurrer to the complaint filed by the defendant to which order the defendant, on May 7, 1918, presented an exception which reads as follows:

(Heading and Title Omitted.)

Now comes the Solicitor-General as attorney for the defendant in the above-entitled case, and respectfully excepts to the order of the Court overruling the demurrer to the plaintiff's complaint.

Manila, May 6th, 1918.

QUINTIN PAREDES,
Solicitor-General.

Thereafter, on May 8, 1918, the said Solicitor-General, on behalf of the defendant, filed an answer to the complaint which reads as follows:

12 (Heading and Title Omitted.)

Answer.

Comes now the defendant in the above entitled cause, by his attorney the undersigned the Solicitor-General for the Philippine Islands, and, reserving the objection that the complaint does not state a cause of action, admits that the allegations of the said complaint are true.

Manila, P. I., May 8, 1918.

QUINTIN PAREDES,
Solicitor-General,
Attorney for the Defendant.

On July 25, 1918, the Honorable James A. Ostrand, Judge of the Court of First Instance of Manila, Ninth Judicial District, entered judgment and decision in the case which reads as follows:

13 UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance for the City of Manila.

(Case No. 15,842.)

SMITH, BELL & COMPANY, LIMITED, Plaintiff,

versus

JAMES J. RAFFERTY, Collector of Internal Revenue for the Philippine Islands, Defendant.

Decision.

This action has been brought by Smith, Bell & Co., Ltd., a corporation, to recover from the defendant, James J. Rafferty, the sum of ₱413,180.05, collected from the plaintiff by the defendant, in his capacity as Collector of Internal Revenue, as a percentage tax on sales made by the plaintiff to vendees without the Philippine Islands.

The plaintiff corporation, during the period from October 1, 1916, to December 31, 1917, sold and exported from the Philippine Islands, to various persons and firms without the Philippine Islands, merchandise of the value of ₱41,318,005.00. The defendant, as Collector of Internal Revenue for the Philippine Islands, de-
14 manded of plaintiff a tax of one per centum of the amount of the sales, basing his demand upon the provisions of section 1614 of Act 2657 (the Administrative Code of 1916) and section 1459 of Act 2711 (the Administrative Code of 1917). The plaintiff corporation paid the tax demanded, amounting to ₱413,180.05, under written protest on the ground that it was a tax upon exports from the Philippine Islands the levy or collection of which was

prohibited by the provisions of section 11 of the Act of Congress of August 29, 1916, known as the "Jones Law." Defendant denied the protest and refused to return the tax paid. Plaintiff sues for the recovery of the tax, with interest and costs, setting up five causes of action corresponding to the five quarters for which the tax was paid. Defendant, by answer, admits that the allegations of the complaint are true, but denies that the complaint states a cause of action.

Section 1614 of Act 2657, which was reenacted as section 1459 of Act 2711, provides:

"All merchants not herein specifically exempted shall pay a tax of one per centum on the gross value in money of the commodities, goods, wares, and merchandise sold, bartered, exchanged, or consigned abroad by them, such tax to be based upon the actual selling price or value of the things in question at the time they are disposed of or consigned, whether consisting of raw material or of manufactured or partially manufactured products, or whether of domestic or foreign origin. The tax upon things consigned abroad shall be refunded upon satisfactory proof of the return thereof to the Philippine Islands unsold."

Section 11 of the Jones Law provides:

"That no export duties shall be levied or collected on exports from the Philippine Islands, but taxes and assessments on property and license fees for franchises, and privileges, and internal taxes, direct or indirect, may be imposed for the purposes of the Philippine government, and provincial and municipal governments thereof, respectively, as may be provided and defined by acts of the Philippine Legislature, etc."

There being no dispute as to the facts, the only question to be determined is whether or not a tax imposed, under the above quoted sections of the Administrative Codes of 1916 and 1917, on merchandise sold and exported from the Philippine Islands to various persons and firms without the Philippine Islands, is a duty on exports the levy or collection of which is prohibited by the quoted section of the Jones Law.

In the case of Macleod & Co., Inc. vs. The Collector of Internal Revenue, R. G. No. 7444 (unreported), the Supreme Court of the Philippine Islands held that a tax on a sale of hemp made in Manila to the Manila agent of certain cordage companies located in the United States, and delivered to the vendee on board a vessel for shipment to the United States, was in effect and result a tax on exports.

In the recent case of Crew Levick Co. vs. Pennsylvania (United States Advance Opinions 1917, page 122), it appeared that the State of Pennsylvania had levied a tax of one-half mill on each dollar of the gross annual business of wholesale dealers in goods, wares, and merchandise. The Supreme Court of the United States without dissent, held that, in so far as this tax affected sales abroad, it was a tax on exports, and unconstitutional.

The two cited cases are compelling upon this court. The tax in question is a duty on exports, and was unlawfully levied and collected. However, Congress, by the Urgent Deficiency Appropriation Act of June 4, 1918, has ratified and confirmed the collection of taxes imposed by Act No. 2711 (Administrative Code of 1917). Plaintiff may, therefore, recover only such taxes as were levied and collected under the provisions of Act No. 2657 (Administrative Code of 1916), which are admitted to amount to the sum of ₱306,716.43.

Let judgment be entered for plaintiff in the sum of ₱306,-
17 716.43. No interest or costs will be allowed.

It is so ordered.

JAMES A. OSTRAND,
Judge.

The parties having been notified of the foregoing decision, the plaintiff, by its attorneys, on July 29, 1918, presented an exception and, at the same time, gave notice of its intention to prepare and file a bill of exceptions for the review of the case by the Supreme Court. Said exception and notice reads as follows:

(Heading and Title Omitted.)

Exception and Notice.

Now comes the plaintiff in the above-entitled cause, by its undersigned attorneys, and excepts to the decision of this court rendered on the 25th day of July, 1918, and announces its intention of perfecting a bill of exceptions for the review of the said cause by the Supreme Court.

Manila, P. I., July 27, 1918.

LAWRENCE & ROSS,
(Sgd.) By J. G. LAWRENCE,
Attorneys for Plaintiff.

On the same date, to wit, July 29, 1918, the Attorney-General, on behalf of the defendant, filed the following exception and
18 motion for new trial:

(Heading and Title Omitted.)

Exception and Motion for New Trial.

Now comes the defendant in the above-entitled cause and respectfully excepts to the decision of this court, dated the 25th day of July, 1918, to so much of said decision and judgment as declares that the amounts paid by the plaintiff as taxes on goods sold and exported from the Philippine Islands during the periods in which Act No. 2567 was in force, have been illegally collected, and to so much thereof as orders the return of the sum of ₱306,716.43 to the plain-

tiff; and moves this honorable court to set aside the judgment rendered herein and grant a new trial of said action for the following reasons:

1. The evidence presented is insufficient to justify the decision.

2. That the decision is contrary to the law.

Manila, P. I., July 29, 1918.

QUINTÍN PAREDES,
Attorney-General.

Thereafter, on August 10, 1918, the foregoing motion for a new trial was denied by the court; to the order denying the said
19 motion for new trial the defendant, on August 17 of the same year, excepted forthwith and gave notice of his intention to file a bill of exceptions for the review of the case by the Supreme Court, as follows:

(Heading and Title Omitted.)

Exception.

On this 16th day of August, 1918, the undersigned has received notice of the order of this court of August 10, 1918, by which defendant's motion for a new trial was denied. The defendant enters his exception to said order of the court and at the same time notifies the court of his intention to present a bill of exception in order that the Supreme Court may revise the judgment entered in this cause.

Manila, August 16, 1918.

QUINTÍN PAREDES,
Attorney-General.

On August 6 and August 21, 1918, and within the time limited by law, both plaintiff and defendant by their respective attorneys filed with the Court of First Instance their respective bill of exceptions praying that the same be approved and certified, and forwarded th-reafter to the Clerk of the Supreme Court of the Philippine Islands, together with all evidence given at the hearing of the case, which said evidence is thereby incorporated by reference into
20 said bill of exceptions, so that the error complained of may be considered by the Supreme Court.

On August 10 and August 31, 1918, the Court of First Instance approved, signed, and certified the respective bill of exceptions presented by the parties, and the same, on September 10, 1918, were transmitted to the office of the Clerk of the Supreme Court of the Philippine Islands, together with the record of the case, for the purposes of the appeal.

On September 12, 1918, the case was duly docketed, on appeal, bearing No. 14466 of the General Register of the Supreme Court.

Thereafter, on September 19, 1918, the bill of exceptions tendered by the plaintiff was printed and filed.

On October 3, 1918, the plaintiff and appellant, through its attorneys, filed its brief in the case assigning the following errors:

Assignment of Errors.

I. That the trial court failed to give judgment for plaintiff for the recovery of the taxes collected by the defendant for the period from October 1, 1917, to December 31, 1917.

II. That the trial court failed to give judgment for plaintiff for interest and costs.

On October 18, 1918, the bill of exceptions tendered by the defendant was printed and filed.

21 On December 18, 1918, the plaintiff and appellant, through its Attorneys, filed in the case its brief as appellee.

On January 8, 1919, the Attorney-General, on behalf of the defendant and appellant, filed also his brief in the case assigning the following errors.

Assignment of Errors.

1. The trial court erred in holding that the taxes collected under section 1614 of Act 2657 from October 1, 1916, to September 30, 1917, have been ratified, confirmed and validated by the Act of Congress of June 4, 1918.

2. The trial court erred in ordering the refund of such taxes to plaintiff.

On January 25, 1919, the case was finally submitted to the Supreme Court for decision on the merits.

Thereafter, on January 26, 1920, the Supreme Court of the Philippine Islands rendered its decision in the case, which said decision is in the words and figures following, to wit:

22 THE UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

In Banc.

G. R. No. 14466.

Promulgated January 26, 1920.

Submitted January 25, 1919.

Justices present: The Chief Justice, Cayetano S. Arellano, and Messrs. Florentino Torres, E. Finley Johnson, Manuel Araullo, Thos. A. Street, Geo. A. Malcolm, and Ramón Avanceña.

SMITH, BELL & COMPANY, LIMITED, Plaintiff and Appellant,

versus

JAMES J. RAFFERTY, Collector of Internal Revenue for the Philippine Islands, Defendant and Appellant.

Decision.

JOHNSON, *J.*:

The only question presented by this appeal is, was the tax levied and collected by the defendant from the plaintiff upon certain merchandise, the produce of the Philippine Islands, which had been sold and exported from the Philippine Islands to various
23 persons and firms without the Philippine Islands during the period from October 1, 1916, to December 31, 1917, legally levied and collected?

There is no dispute about the facts. They are admitted, and may be stated as follows:

That the defendant, in his capacity as Collector of Internal Revenue for the Philippine Islands, collected of the plaintiff, under protest, a 1% tax on merchandise, the produce of the Philippine Islands, which the latter had sold and exported from the Philippine Islands to various persons and firms without the Philippine Islands. The total amount of such taxes is the sum of ₱413,180.05. The different periods covered by said collections were:

(*a*) From October 1, 1916, to December 31, 1916;

(*b*) From January 1, 1917, to March 31, 1917;

(*c*) From April 1, 1917, to June 30, 1917;

(*d*) From July 1, 1917, to September 30, 1917;

(*e*) From October 1, 1917, to December 31, 1917.

Said five periods constitute, for the purposes of this decision, but two: namely, (1) from October 1, 1916, to September 30, 1917, and (2) from October 1, 1917, to December 31, 1917.

The collections for the periods (*a*), (*b*), (*c*), and (*d*) (or the first period) above were made under the provisions of section 1614
24 of Act No. 2657, while that for the period (*e*) (or the second period) was made under the provisions of section 1459 of Act No. 2711.

Upon a consideration of the above facts and the law, the Hon. James A. Ostrand, Judge, rendered a judgment, the dispositive part of which is as follows:

"The tax in question is a duty on exports, and was unlawfully levied and collected. However, Congress, by the Urgent Deficiency Appropriation Act of June 4, 1918, has ratified and confirmed the collection of taxes imposed by Act No. 2711 (Administrative Code of 1917). Plaintiff may, therefore, recover only such taxes as were

levied and collected under the provisions of Act No. 2657 (Administrative Code of 1916), which are admitted to amount — the sum of ₱306,716.43.

A judgment was rendered for said amount, without the allowance of interest and costs.

From that judgment both the plaintiff and defendant appealed. The plaintiff-appellant alleges that the lower court committed an error (*a*) in not allowing the recovery of the taxes collected by the defendant for the period from October 1, 1917, to December 31, 1917 (or the second period); and (*b*) in not giving a judgment in favor of the plaintiff for interest and costs. The defendant-appel-
25 lant alleges that the lower court committed an error in not holding that the taxes collected under section 1614 of Act No. 2657, covering the period from October 1, 1916, to September 30, 1917, for the reason that section 1614 of said Act (2657) had been ratified, confirmed and validated by the Act of Congress of June 4, 1918.

Said section 1614 of Act No. 2657 provides among other things the following:

"Sec. 1614. Percentage Tax on Merchants' Sales.—All merchants not herein specifically exempted shall pay a tax of one per centum on the gross value in money of the commodities, goods, wares, and merchandise sold, bartered, exchanged, *or consigned abroad* by them, such tax to be based on the actual selling price or value at which the things in question are disposed of or consigned, whether consisting of raw material or of manufactured or partially manufactured products, and whether of domestic or foreign origin. The tax upon things consigned abroad shall be refunded upon satisfactory proof of the return thereof to the Philippine Islands."

Said quoted provisions of section 1614 is an amendment of former Acts (section 40 of Act No. 2339, section 2 of Act No. 2541, and section 3 of Act No. 2622). The important part of the said
26 amendment, involved in the present case, is found in the parts italicized in the above quotation. Said section (1614) became effective July 1, 1916.

Said section 1614 of Act No. 2657 was amended by section 1459 of Act No. 2711, which became effective on the first day of October, 1917. Act No. 2711 (section 1459) expressly repealed section 1614 of Act No. 2657. The amendment of section 1459 of Act No. 2711 made no important changes in section 1614 of Act No. 2657.

The plaintiff-appellant contended in the court below that all taxes collected under section 1614 of Act No. 2657 and section 1459 of Act No. 2711 were illegally collected, upon the theory that said tax was a tax upon exports which is expressly prohibited by section 11 of the Jones Law (Act of Congress of August 29, 1916, Vol. 12, Public Laws, p. 237). The lower court sustained the contention of the plaintiff except as to the taxes collected under section 1459 of Act No. 2711 (October 1st to December 31st, 1917) for the

reason that Congress had expressly ratified the provision of said section notwithstanding the said provisions of the Jones Law.

With the contention of the plaintiff we fully agree not only because of the provisions of section 11 of the Jones Law but
27 as well for the reasons given by the Supreme Court of the United States in the case of Crew Levick Company vs. Commonwealth of Pennsylvania (245 U. S., 292; 256 Pa. St., 508) as well as the decision of this Court in the case of Macleod & Co. vs. Collector of Internal Revenue (R. G. No. 7444). In the case of Crew Levick Co. vs. Pennsylvania, the Supreme Court of the United States said:

"The bare question, then, is whether a state tax imposed upon the business of selling goods in foreign commerce, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries, is in effect a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the Federal Constitution. Although dual in form, the question may be treated as a single one, since it is obvious that, for the purposes of this case, an impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms. And there is no suggestion that the tax is limited to the necessities of inspection, or that the consent of Congress has been given. We are constrained to hold that the answer must be in the affirmative."

The doctrine announced in that decision is in conformity not only with the commerce clause of the Constitution of the
28 United States (Par. 2, Sec. 10, Art. I, Const. of the U. S.) but with many other decisions of the Supreme Court of the United States.

Patapsco Guano Co. vs. North Carolina Board of Agriculture, 171 U. S. 345, 350;
Brown vs. Maryland, 12 Wheat. 419;
Nathan vs. Louisiana, 9 How. (U. S.) 73;
Cook vs. Pennsylvania, 97 U. S. 566;
Pittaburg, etc., Ce. vs. Louisiana, 156 U. S. 590;
Trade-Mark Cases, 100 U. S. 82;
Almy vs. California, 12 How. 169;
McCulloch vs. Maryland, 4 Wheat. 316.

The right to regulate inter-state commerce is expressly reserved to the Congress of the United States by the Constitution. The Congress exercised the right reserved to it by section 11 of the Jones Law.

Section 1614 of Act No. 2657 which provided for an export tax was in force in the Philippine Islands during the period from October 1, 1916, until September 30, 1917. An export tax is expressly prohibited by article 11 of the Jones Law. The Jones Law was in force during that period (October 1, 1916, to September 30, 1917). Considering the provisions of the Jones Law, we must conclude that the collections for that period (October 1, 1916, to Sep-

tember 30, 1917), which amounted to ₱306,716.43, were illegal and must be returned as ordered by the lower court.

29 The question whether or not the collections made by the defendant during the period from October 1, 1917, to December 31, 1917, were legal, presents some difficulties not presented in relation to the period of October 1, 1916, to September 30, 1917. Section 1611 of Act No. 2657 was amended by section 1459 of Act No. 2711. Act No. 2711 was adopted by the Philippine Legislature on the 10th day of March, 1917, but did not become effective until October 1, 1917. At the time said section (1459) became effective (October 1, 1917) the provision, prohibiting an export tax, of the Jones Law was still in force, and in the absence of other conditions the taxes collected for that period (from October 1, 1917, to December 31, 1917) would be equally illegal with the taxes collected under the provisions of section 1614 of Act No. 2657 (from October 1, 1916, to September 30, 1917). We find, however, that section 1459 of Act No. 2711 was expressly ratified by an Act of Congress of June 4, 1918, in the language following: "The taxes imposed by the Philippine Legislature in section 1459 of the Act numbered 2711, enacted by that body on March 10, 1917, are hereby legalized and ratified, and the collections of all such taxes heretofore or hereafter, legalized, ratified and confirmed hereby as fully to all intents and purposes as if the same by prior act

30 of Congress specifically had been aut-orized and directed."

Said Act (June 4, 1918) being an Act of Congress—the same authority which adopted the Jones Law—must be taken and accepted as an amendment or a repeal of the Jones Law so far as the latter affected said section 1459. We must conclude, therefore, that the authority for the collections of the taxes under section 1459 of Act No. 2711 having been fully ratified and confirmed by the Congress of the United States, that said collections were made in accordance with law. Congress is possessed with full authority to ratify subject perhaps to certain Constitutional limitation, the Acts of the Philippine Legislature (U. S. vs. Heenszen & Co., 206 U. S., 307).

The defendant-appellant contends that the Act of Congress of June 4, 1918, had the effect of ratifying section 1614 of Act No. 2657. There might be some merit in that contention if Congress had ratified or recognized the authority of the Philippine Legislature to impose an export tax. Upon the contrary, however, we find (*a*) that Congress, in section 11 of the Jones Law, expressly deprived the legislature of such power and (*b*) by said Act of June 4, 1918, ratified only the particular Act (2711) by mentioning the particular section in question. The ratification can only be held to be a ratification of the law mentioned in it. If Congress

31 had intended to ratify the general power in the Philippine Legislature and that specific Act, it would have so stated and would not have ratified and legalized a specific section of a specific law. The ratification cannot be held to go beyond its terms.

Our conclusions are:

1. That the tax of 1% imposed by the Philippine Legislature upon merchandise, the produce of the Philippine Islands, which is sold and exported from the Philippine Islands to various persons and firms without the Philippine Islands, is an export tax;

2. That an export tax in the Philippine Islands is expressly prohibited by section 11 of the Jones Law;

3. That said section 11 of the Jones Law was in force and effect in the Philippine Islands from the 29th day of August, 1916, until the 30th day of September, 1917, thereby covering the entire period (October 1, 1916, to September 30, 1917) during which the taxes were collected under the provisions of section 1614 of Act No. 2657;

4. That while the tax provided for and collected under section 1459 of Act No. 2711 during the period of October 1, 1917, to December 31, 1917, were expressly prohibited by the Jones Law, yet nevertheless, by reason of the express ratification of said section (1459) by the Act of Congress of June 4, 1918, said collections were ratified, legalized and confirmed;

5. That the taxes collected for the period of October 1, 1916, to September 30, 1917, being illegally collected, the plaintiff is entitled to a judgment for the return of the same, together with interest at 6% on the following amounts from the following dates until paid:

(*a*) On ₱48,532.36, from the 18th day of January, 1917;

(*b*) On ₱58,844.38, from the 19th day of April, 1917;

(*c*) On ₱94,067.50, from the 19th day of July, 1917, and

(*d*) On ₱105,272.19, from the 19th day of October, 1917.

H. E. Heacock Co. vs. Insular Collector of Customs, 37 Phi., 97;
Hongkong & Shanghai Banking Corporation vs. Rafferty, 16 Off. Gaz., 1970;
Erskine vs. Van Arsdaley, 15 Wall., 68;
National Home vs. Parrish, 229 U. S., 496;
Section 144 of the Internal Revenue Act of 1914;
Article 1108, Civil Code.

6. With reference to the costs, section 487 of Act No. 190 provides that: "Costs shall ordinarily be allowed to the prevailing party as a matter of course, but the court shall have power, for special reasons, to adjudge that either party shall pay the costs of an action, or that the same be divided as may be equitable." We have, as a matter of practice, always imposed costs upon the appellant who has failed in this Court to obtain a reversal or a modification of the judgment of the lower court. There seems to be no good reason in the present case for changing or modifying that rule.

Therefore, and for the foregoing reasons, the judgment of the

lower court is hereby affirmed, with interest and costs as above indicated.

Ten days after notice of this decision final judgment will be entered, and five days thereafter the record will be remanded to the court below.

It is so ordered.

Arellano, Ch. J., and Torres and Araullo, JJ., concur.

MALCOLM, *J.*, concurring in part and dissenting in part, with whom Street and Avanceña, JJ., concur:

I agree with so much of the decision as relates to the main question. I disagree with so much thereof as relates to the minor question of costs. My reasons follow:

In the United States the rule is well established, that unless expressly authorized by statute, a judgment for costs either in a civil or criminal case cannot be rendered against the United States or a state. The question was early presented to the United States Supreme Court and Mr. Chief Justice Marshall dismissed it in
34 a decision which reads as follows: "The United States never pay costs." (U. S. vs. Barker, 1817, 2 Wheat. (U. S.) 395.) In the Antelope, 1827, 12 Wheat. (U. S.) 546, the court held that: "It is a general rule, that no court can make a direct judgment or decree against the United States, for costs and expenses, in a suit to which the United States is party, either on behalf of any suitor, or any officer of the government." (See to the same effect, U. S. vs. Ringgold, 1834, 8 Pet. (U. S.) 150; U. S. vs. McLemore, 1846, 4 How. (U. S.) 286; U. S. vs. Boyd, 1847, 5 How. (U. S.) 29; Stanley vs. Schwalby, 1895, 162 U. S. 255; U. S. vs. Verdier, 1896, 164 U. S. 213; Pine River Logging, etc., Co. vs. U. S., 1901, 186 U. S. 279; Marine vs. Lyon, 1894, 62 Fed. Rep. 153, 10 C. C. A. 315; Nabb's Case, 1 Ct. Cl. 173; Henry's Motion, 15 Ct. Cl. 162; U. S. vs. Warren, 1903, 12 Okla. 350, 71 Pac. Rep. 685.) Likewise, a state is not liable for court costs in the absence of an express statute creating such liability. (Greer County vs. Watson, 1898, 7 Okla. 174; Collier vs. Powell, 1853, 23 Ala. 579; People vs. Pierce, 1844, 6 Ill. 553; Turner vs. Com., 1859, 2 Met. (Ky.) 619; Com. vs. Todd, 1873, 9 Bush (Ky.) 708; State vs. Taylor, 1881, 33 La. Ann. 1270; Townsend's Succession, 1888, 40 La. Ann. 66, 3 So. Rep. 488; State vs. Greenwell, 1832, 4 Gill & J. (Md.) 407;
35 State vs. Williams, 1905, 101 Md. 529, 4 Ann. Cas. 970; State vs. Kinne, 41 N. H. 238; State vs. Harrington, 1802, 2 Tyler (Vt.) 44; State vs. Bradford Sav. Bank, etc., Co., 1898, 71 Vt. 234, 44 Atl. Rep. 349; Beachy vs. Lamkin, 1866, 1 Idaho 50; Stone vs. Falconer, (Ky. 1900) 54 S. W. Rep. 712; Prince vs. State, 1846, 7 Hump. (Tenn.) 137; State vs. Montgomery, 1883, 74 Ala. 226; People vs. Madison County, 23 Ill. App. 386, affirmed 125 Ill. 334, 17 N. E. Rep. 802; State vs. Waggner, 1890, 42 La. Ann. 54, 8 So. Rep. 209; State vs. Watson, (Tenn. Ch. 1896) 39 S. W. Rep. 536; State vs. Bradford, 1859, 32 Vt. 50; Stephens vs.

State, 1872, 47 Ala. 696; State vs. Brewer, 1877, 59 Ala. 130; Dawson vs. Matthews, 1894, 105 Ala. 485, 17 So. Rep. 19; Moore vs. People, 37 Ill. App. 641; State vs. Wormick, 1878, 1 Lea (Tenn.) 559; Morgan vs. Pickard, 1887, 86 Tenn. 208, 9 S. W. Rep. 690; Noyes vs. State, 1879, 46 Wis. 250, 1 N. W. Rep. 1; Boykin vs. People, 1896, 23 Colo. 183, 46 Pac. Rep. 635; District of Columbia vs. Lyon, 7 Mackey (D. C.) 222; Kitchell vs. Madison County, 1843, 5 Ill. 163; Rawley vs. Vigo County, 1830, 2 Blackf. (Ind.) 355; Miami County vs. Blaka, 1863, 21 Ind. 32.) As emphasizing the general rule, special statutes creating a liability on the part of the state for court costs in civil cases have been passed in certain states. If there is added to the foregoing the further prin-
36 ciple that an official who is sued by a private individual is not liable personally for costs, the absoluteness of the rule which in effect is a subsidiary proviso of the main proposition, making the government immune from suit, is demonstrated. (Hammond vs. The People, 1863, 32 Ill. 446.)

In the Philippines, the question of costs against the Government appears to have been first raised directly in the case of The Hongkong, Shanghai Banking Corporation vs. Rafferty, (1918, 16 O. G. 1970.) In an action instituted by the Hongkong, Shanghai Banking Corporation against James J. Rafferty, as Collector of Internal Revenue of the Philippine Islands, the recovery of certain taxes was asked by the plaintiff. In resolving the assignment of error of the plaintiff-appellant, the subject of costs against the Government was fully considered and it was held without dissent that no costs should be allowed against the Government of the Philippine Islands, in cases in which the Government of the Philippine Islands or a nominal representative of the Government is the unsuccessful party. It is this rule, predicated as it is on the jurisprudence of the United States and England, which should here again be applied, and should continue to be applied until the Philippine Legislature shall see fit by special statute to make the Government liable for costs.

37 Judgment should be affirmed, with interest since this action was instituted and accrued before the Administrative Code of 1917 went into effect, but without costs in either instance.

On January 27, 1920, the parties were duly notified of the foregoing decision, and, on February 6 of the same year, the Attorney-General, on behalf of the defendant and appellant, filed the following motion for reconsideration:

(Heading and Title Omitted.)

Motion for Reconsideration.

Now comes the Attorney-General on behalf of the defendant in the above-entitled case and moves for a reconsideration of the decision rendered by this Court on January 26, 1920, in so far as the same holds that:

1. The tax of one per centum imposed by the Philippine Legislature on the gross value in money of the commodities, goods, wares and merchandise sold, bartered, exchanged, or consigned abroad, is a tax on exports;

2. The collection of said tax during the period of time from October 1, 1916, to September 30, 1917, was illegal, and further that the same was not legalized and ratified by the Law of Congress of June 4, 1918, and that, therefore said amounts collected
38 should be returned to the plaintiff;

3. The defendant should pay interest on the amounts aforementioned;

4. The defendant should pay the costs of the action.

Argument.

I.

It is our contention that the present tax of one per cent is not a tax on exports but it is, as the law designates it, a percentage tax on merchant's sales. As stated by an eminent writer, "to come within the definition of an export tax, it has been held that the tax must be levied upon the right to export, or upon goods because of the fact that they are being exported or are intended to be exported. The fact that certain goods are intended for export does not, however, exempt them from an ordinary property tax, for, as said, the tax is one on exports only when its incidence or amount is determined by the fact that the goods are intended for export. This is the doctrine laid down in Coe vs. Errol with reference to taxation by the States and in Turpin vs. Burgess with reference to federal taxation." (1 Willoughby on The Constitution, p. 611.) Section 1611 of Act 2657 and section 1459 of Act 2711 clearly impose the tax on sales, exchanges and consignments, and the fact that
39 some of those goods may be exported cannot give to the general tax the standing of an export tax, for the reason that the exportation is merely *in* incidental and does not form the basis or the main consideration for the tax. Consequently, it does not come within the prohibition clause of the Jones Law in section 11 thereof.

Furthermore, assuming that there is a doubt as to whether the present tax is a tax on exports or a percentage tax on sales, the doubt should be resolved in such a manner as to hold the law valid. It is an elementary principle of statutory construction that where the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other it would be valid, the courts should adopt the construction which would uphold it. (6 R. C. L., p. 78.) Accordingly, in case of any doubt, the tax may and should properly be considered as a percentage tax on sales.

II.

But even granting for the sake of argument that collection of the tax during the period intervening between October 1, 1916 and September 30, 1917 was illegal, we hold that the same is included in the ratification by Congress, embodied in its Act of June 4, 1918.

40 The present decision (on page 4) holds that Act 2711 (section 1459) expressly repealed section 1614 of Act 2657. We beg to differ from said holding. Act 2711 not only did not repeal Act 2657 (see list of repealed statutes in last section of Act 2711), but merely amended the same (see preamble of Act 2711) and what is more, section 1459 of Act 2711 incorporating as it does section 1614 of Act 2657 and containing its exact provisions, must be held to be a continuation of the latter. (See section 3, Act 2711.) Being a mere amendment and a continuation of Act 2657, it should consequently be given a retrospective effect.

Where a statute, or a portion thereof, is amended by declaring that, as amended, it shall read as follows, and therein setting forth the amended section in full, the provisions of the original statute that are repeated are to be considered as having been the law from the time they were first enacted, and the new provisions are to be understood as enacted at the time the amended act takes effect. (36 Cyc. 1223, and authorities therein cited.)

It is evident from the authority above quoted that, if section 1459 of Act 2711 is to be considered the law on the subject since the enactment of section 1614 of Act 2657, then the ratification

41 measure of Congress above referred to must necessarily be held to cover the period from the date of the promulgation of Act 2657; consequently, it must be held to have also ratified and legalized the collection of taxes from October 1, 1916, to September 30, 1917.

III.

Assuming for a moment that the defendant should return to the plaintiff the sums which the decision has held to be illegally collected and not ratified, we submit that interest thereon should not be paid. The defendant here is but a nominal representative of the Government and the latter is the real party in interest and is the one responsible for the consequences and for the satisfaction of any money liability which may be adjudged against the defendant. In support of our contention we need but refer to the decision of this court wherein this point has clearly and explicity been decided. In the case of Marine Trading Co. vs. The Government of the Philippine Islands (R. G. No. 14443), this Court has said:

"It is the undoubted law that the State (in this jurisdiction, the Government of the Philippine Islands) never pays interest unless it expressly engages to do so. This is especially true in case the claim is an unliquidated one. Among other authorities, we find

42 Angarica vs. Bayard, 1887, 127 U. S., 251, in which Mr. Justice Blatchford said:

"'The case, therefore, falls within the well-settled principle, that the United States are not liable to pay interest on claims against them, in the absence of express statutory provision to that effect. It has been established, as a general rule, in the practice of the Government, that interest is not allowed on claims against it, whether such claims originate in contract or intort, and whether they arise in the ordinary business of administration or under private acts of relief, passed by Congress on special application. The only recognized exceptions are, where the Government stipulates to pay interest and where interest is given expressly by an act of Congress, either by the name of interest or by that of damages.'"

In the case of Sarasola vs. Trinidad, 17 Official Gazette, p. 1874, this Court held that:

"It is well-settled both on principle and authority that interest is not to be awarded against a sovereign government, as the United States or State, unless its consent has been manifested by an Act of its Legislature or by a lawfull contract of its executive officers. If there be doubt upon the subject that doubt must be resolved in favor of the State. In Gosman's Case (1881), L. R. 17 Ch. Div., 771), Sir George Jessel, Master of the Rolls, speaking for
43 the Court of Appeals, summed up the Law of England in this concise statement: 'There is no ground for charging the Crown with interest. Interest is only payable by statute or by contract.' In Attorney-General vs. Cape Fear Navigation Co. (1843, 37 N. C., 444), Chief Justice Ruffin laid down as undoubted law that 'the State never pays interest unless she expressly engages to do so.' Judge Cooley says that 'The recovery (in tax suits) must be limited to the money received. * * * Interest is recoverable only when expressly allowed by statute.' (2 Cooley on Taxation, 3d Ed., p. 1510; Savings and Loan Society vs. San Francisco (1901, 131 Cal., 356). In United States vs. Sherman (1868, 98 U. S., 465), the court, in considering a law relating to suits against revenue officers providing for recovery of the amount payable out of the treasury, held that the amount recoverable did not include interest upon the judgment. Justice Strong, delivering the opinion of the court, in part said:

"When the obligation arises, it is an obligation to pay the amount recovered; that is, the amount for which judgment has been given. The act of Congress says not a word about interest. Judgments, it is true, are by the law of South Carolina, as well as by Federal legis-
44 lation, declared to bear interest. Such legislation, however, has no application to the government. And the interest is not part of the amount recovered. It accrues only after the recovery has been had. Moreover, whenever interest is allowed either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor. But delay or default cannot be attributed to the gov-

ernment. It is presumed to be always ready to pay what it owes. (See also U. S. vs. Bayard (1888), 127 U. S., 251; U. S. vs. North Carolina (1890), 136 U. S., 211; Board of County Commissioners vs. Kaul (1908), 17 L. R. A. (N. S.), 552.)

"As this is the main rule, the converse proposition must be equally true, that taxes only draw interest as do sums of money when expressly authorized. A corollary to the principle is also self-evident, that interest cannot be recovered on an abatement unless the statute provides for it. (1 Cooley on Taxation, 3d Ed., p. 20; 2 Cooley on Taxation, 3d Ed., p. 1392; City of Lowell vs. County Commissioners of Middlesex (1862), 3 Allen (Mass.), 550.) The only contrary dictum is to the effect that where an illegal tax has been collected, the citizen who has paid and is obliged to bring suit against the collector is entitled to interest from the time of the illegal exaction. (Erskine vs. Van Arsdale (1872), 15 Wall., 75; National Home vs. Parrish (1913), 229 U. S., 494; Matter of O'Berry
45 (1904), 179 N. Y., 285.) The distinction undoubtedly arises through the fiction that the suit is against the collector and not against the State, although the judgment is not to be paid by the collector but directly from the treasury.

"It has been urged that since interest is in the nature of damages, it is proper for allowance. While this may be true in the general run of cases it is not to be necessarily true when the sovereign power is concerned. The state is not amenable to judgments for damages or costs without its consent. (Hongkong and Shanghai Banking Corporation vs. Rafferty (1918), 16 Off. Gaz., 1970, citing numerous decisions.)

* * * * * * *

"Our statute, it will be remembered, not only does not authorize interest but negatives the payment of interest. While, therefore, coming under the purview of the general principle pertaining to legislative discretion, it also avoids any trouble to be found in those decisions which allow interest without any express provision on the subject, because the statute provides that interest shall not be allowed. * * *

* * * * * * *

"Applying these well-known principles to the case at bar, it would seem that the legislature has considered that a law providing
46 for the payment of a tax with a right to bring a suit before a tribunal to recover back the same without interest is a full and adequate remedy for the aggrieved taxpayer. The disallowance of interest in such case like the other steps prescribed as conditional to recovery, has been made one of the conditions which the lawmakers have seen fit to attach to the remedy provided. * * *."

We understand that there are a few decisions among which is Erskine vs. Van Arsdale, 15 Wall., 75, holding that interest is in some cases recoverable from representatives of the Government, but

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said cases are decidedly in the minority and do not carry the preponderance of authority. Moreover, these same cases have already been considered by this Court and the Case of Sarasola vs. Trinidad above referred to and, nevertheless, the contrary doctrine which we are invoking has been upheld.

It is a well established principle that the state may not be sued without its consent, and if it does consent to be sued, it can impose such conditions and restrictions as it may see fit. The Philippine Legislature by section 1679 saw fit to limit the liability of the Government in cases like the present, to the payment of the amount of any tax illegally collected, without interest. This provision of law is clear, and unless it is held to be invalid, then, any inter-
47 pretation or reconstruction thereof by which the Government or any of its nominal representatives may be made to pay interest on any sums illegally collected would clearly run counter to the manifest intention of the Legislature.

IV.

As to the payment of costs, we can do no better than to refer to the opinion concurring and in part dissenting written by Mr. Justice Malcolm in the present case and the numerous authorities cited therein, to support our contention that the defendant has been erroneously ordered to pay the costs, assuming that the amount of taxes should be returned to the plaintiff. It may further be added that the doctrine enunciated in the case of Hongkong & Shanghai Banking Corporation vs. Rafferty, (16 Off. Gaz., 1970), that interests and costs may not be allowed against the Government, was again laid down and ratified in the case of Sarasola vs. Trinidad, 17 Off. Gaz., 1874.

Conclusion.

In view of the foregoing observations, it is respectfully submitted that the tax in question is not an export tax but rather a percentage tax on sales, and, therefore, does not contravene the provisions of section 11 of the Jones Law; that even granting that the said
48 tax is an export tax, the collection during the period between October 1, 1916 and September 30, 1917 was ratified and validated by Congress thru its Act of June 4, 1918; that, assuming for a moment that the plaintiff is legally entitled to the amounts held to have been illegally collected from him, still, said sums did not draw interest and that, consequently, no interest should be allowed against the Government or its nominal representative the defendant herein; that the defendant representing the Government may not be ordered to pay costs.

Wherefore, the undersigned respectfully prays that the foregoing motion for reconsideration be granted.

QUINTÍN PAREDES,
Attorney-General.

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The foregoing motion for reconsideration was denied by the Supreme Court in its session of March 11, 1920.

Thereafter, on March 15, 1920, the Clerk of the Supreme Court of the Philippine Islands entered the final judgment in the case which reads as follows:

49 THE UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

(G. R. No. 14466.—March 15, 1920.)

SMITH, BELL & COMPANY, LIMITED, Plaintiff and Appellant,

versus

JAMES J. RAFFERTY, Collector of Internal Revenue for the Philippine Islands, Defendant and Appellant.

Judgment.

The Court having regularly acquired jurisdiction for the trial of the above-entitled cause submitted by both parties for decision, after consideration thereof by the Court upon the record, its decision and order for judgment having been filed on the twenty-sixth day of January, A. D. nineteen hundred and twenty;

By virtue thereof it is hereby adjudged and decreed that the judgment of the Court of First Instance of Manila, dated the twenty-fifth day of July, nineteen hundred and eighteen, and from which the above-entitled appeal was taken, be, and the same is hereby,

50 affirmed, with interest.

[SEAL.]

V. ALBERT,
Clerk of the Supreme Court
of the Philippine Islands.

Certified correct:

[Seal of the Supreme Court of the Philippine Islands.]

V. ALBERT,
Clerk of the Supreme Court
of the Philippine Islands.

Thereafter, on March 18, 1920, the Attorney-General, on behalf of the defendant and appellant, filed the following petition:

(Heading and Title Omitted.)

Comes now the Attorney-General on behalf of the defendant and appellant and excepts to the decision of this court in denying his motion for a rehearing in the above-entitled action, and also excepts to the final judgment entered herein.

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Notice is hereby given that the defendant intends to petition the Supreme Court of the United States for a writ of certiorari for the review of the decision and judgment of this court, and said defendant hereby makes application for the retention of the record in said case in this court pending the preparation, printing and certification of said record and the presentation of said petition to the Su-
51 preme Court of the United States. The said defendant also prays for a stay of the judgment of this court during the pendency of the application for the writ of certiorari and of the proceedings in the Supreme Court of the United States.

Manila, March 16, 1920.

QUINTÍN PAREDES,
Attorney-General, Attorney for Defendant and Appellant.

And finally, on March 19, 1920, the Supreme Court, upon considering the above petition filed by the Attorney-General, on behalf of the defendant and appellant, passed a resolution ordering that the record of the case be retained in the office of the Clerk of said Supreme Court for a period of six months.

52 THE UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

I, V. Albert, Clerk of the Supreme Court of the Philippine Islands, do hereby certify that the foregoing fifty-one (51) printed pages contain a true and correct translation and transcript of the record of the case entitled Smith, Bell & Company, Limited, Plaintiff and Appellant, versus James J. Rafferty, Collector of Internal Revenue for the Philippine Islands, Defendant and Appellant, concerning amount of money, bearing No. 14466 of the docket of this Supreme Court.

In witness whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the Philippine Islands this 26th day of July, A. D. nineteen hundred and twenty.

[Seal of the Supreme Court of the Philippine Islands.]

V. ALBERT,
Clerk of the Supreme Court of the Philippine Islands.

53 UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

I, V. Albert, Clerk of the Supreme Court of the Philippine Islands, in obedience to the writ of certiorari issued by the Supreme Court of

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the United States, dated the 18th day of November, 1920, in Cause No. 544 entitled James J. Rafferty, Collector of Internal Revenue for the Philippine Islands, vs. Smith, Bell & Company, Limited, do hereby make return thereof to said Court, in accordance with the terms of the stipulation filed in said cause by the attorneys of record of the respective parties, the original of which stipulation is hereto attached, this eighteenth day of January in the year of our Lord one thousand nine hundred and twenty-one.

[Seal of the Supreme Court of the Philippine Islands.]

V. ALBERT,
Clerk of the Supreme Court
of the Philippine Islands.

54 In the Supreme Court of the United States, October Term, 1920.

No. 544.

SMITH, BELL & COMPANY, LIMITED, Plaintiff and Appellant,

v.

JAMES J. RAFFERTY, Collector of Internal Revenue for the Philippine Islands, Defendant and Appellant.

Stipulation that Return May Consist of Copy of Record on File.

It is hereby stipulated that the certified copy of the record of this case on application by defendant above named for writ of certiorari, certified July 26, 1920, by the Clerk of the Supreme Court of the Philippine Islands (the case being No. 14,666 in that court), which has been filed in the office of the Clerk of the Supreme Court of the United States, may be taken and deemed the return required by the writ of certiorari granted in the cause by the Supreme Court of the United States under date of November 18, 1920.

Dated Washington, D. C., November 22, 1920.

CLARENCE B. MILLER,
Attorney for Plaintiff-Appellee.
CHARLES MARVIN,
Attorney for Defendant-Appellant.

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55 In the Supreme Court of the United States, October Term, 1920.

No. 544.

SMITH, BELL & COMPANY, LIMITED, Plaintiff and Appellant,

v.

JAMES J. RAFFERTY, Collector of Internal Revenue for the Philippine Islands, Defendant and Appellant.

Stipulation that Return May Consist of Copy of Record on File.

It is hereby stipulated that the certified copy of the record of this case on application by defendant above named for writ of certiorari, certified July 26, 1920, by the Clerk of the Supreme Court of the Philippine Islands (the case being No. 14,666 in that court), which has been filed in the office of the Clerk of the Supreme Court of the United States, may be taken and deemed the return required by the writ of certiorari granted in the cause by the Supreme Court of the United States under date of November 18, 1920.

Dated Washington, D. C., November 22, 1920.

CLARENCE B. MILLER,
Attorney for Plaintiff-Appellee.
CHARLES MARVIN,
Attorney for Defendant-Appellant.

56 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the Philippine Islands, Greeting:

Being informed that there is now pending before you a suit in which Smith, Bell & Company, Limited, is plaintiff and appellant, and James J. Rafferty, Collector of Internal Revenue for the Philippine Islands, is defendant and appellant, which suit was removed into the said Supreme Court by virtue of appeals from the Court of First Instance of Manila, Ninth Judicial District, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, Do hereby com-
57 mand you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

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Witness the Honorable Edward D. White, Chief Justice of the United States, the eighteenth day of November, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

58 [Endorsed:] File No. 27,901. Supreme Court of the United States, October Term, 1920. No. 544. James J. Rafferty, Collector of Internal Revenue for the Philippine Islands, vs. Smith, Bell & Company, Limited. Writ of certiorari. —r Bureau, War Department, Nov. 26, 1920. 27262/75-F.

59 [Endorsed:] File No. 27,901. Supreme Court U. S., October Term, 1920. Term No. 544. James J. Rafferty, Collector etc., petitioner, vs. Smith, Bell & Company, Ltd. Writ of certiorari and return. Filed March 9, 1921.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 140.

JAMES J. RAFFERTY, COLLECTOR OF INTERNAL REVENUE FOR THE PHILIPPINE ISLANDS, PETITIONER,

vs.

COMPANIA GENERAL DE TABACOS DE FILIPINAS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

PETITION FOR CERTIORARI FILED SEPTEMBER 16, 1920.

CERTIORARI AND RETURN FILED MARCH 9, 1921.

(27,905)

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1 THE UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands (Appellate Jurisdiction).

G. R. No. 13889.

COMPANIA GENERAL DE TABACOS DE FILIPINAS, Plaintiff and Appellant,

versus

JAMES J. RAFFERTY, as Collector of Internal Revenue for the Philippine Islands, Defendant and Appellant.

For Refund of Amount Paid for Taxes.

Be it remembered that, on the dates respectively mentioned, the following proceedings were had in the above-entitled case, to wit:

On January 24, 1917, the plaintiff by its attorneys filed with the office of the Clerk of the Court of First Instance of Manila, Ninth Judicial District, the following complaint:

2 UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance of the City of Manila.

(Case No. 14759.)

COMPANIA GENERAL DE TABACOS DE FILIPINAS, Plaintiff,

versus

JAMES J. RAFFERTY, as Collector of Internal Revenue for the Philippine Islands, Defendant.

For its first cause of action, plaintiff avers:

I.

Plaintiff is a foreign corporation organized and existing under and by virtue of the laws of the Kingdom of Spain, duly licensed to do business in the Philippine Islands and maintaining its principal office therein in the City of Manila.

II.

Defendant is, and at all the times hereinafter mentioned has been, the duly appointed and qualified Collector of Internal Revenue for the Philippine Islands, and is a resident of the City of Manila.

3

III.

Plaintiff is, and at all the times herein mentioned has been, engaged in business in the Philippine Islands as a general merchant and as an exporter of Philippine products.

IV.

Between the first day of January, 1916, and the 31st day of March of the same year, plaintiff exported from the Philippine Islands merchandise, the growth and product of the Philippine Islands, of the value of ₱389,629.77.

V.

The said merchandise was at the time of its exportation from the Philippine Islands, during the course of the transportation thereof, and at the time of its arrival at the various ports of destination, the sole and exclusive property of plaintiff, and continued to be the property of plaintiff until sold by plaintiff to consumers in the countries to which said merchandise was exported.

VI.

Defendant herein, acting in his official capacity as Collector of Internal Revenue for the Philippine Islands, made demand upon plaintiff for the payment of a tax of 1% of the value of said merchandise so exported by plaintiff, to wit: the sum of ₱3,896.30,

4 and threatened to enforce payment of said demand by administrative distraint of plaintiff's property.

VII.

On the 18th day of April, 1916, the plaintiff herein, for the purpose of avoiding the distraint of its property, paid defendant, involuntarily and under written protest, the said sum of ₱3,896.30, so demanded by him, and notified the defendant that unless the said protested payment was promptly refunded, suit would be brought for the recovery of same with interest and costs.

VIII.

Defendant overruled plaintiff's protest and refused, and still refuses, to refund the said sum of ₱3,896.30, or any part thereof.

For its second cause of action, plaintiff avers:

I.

Plaintiff is a foreign corporation organized and existing under and by virute of the laws of the Kingdom of Spain, duly licensed

to do business in the Philippine Islands and maintaining its principal office therein in the City of Manila.

II.

5 Defendant is, and at all the times hereinafter mentioned has been, the duly appointed and qualified Collector of Internal Revenue for the Philippine Islands, and is a resident of the City of Manila.

III.

Plaintiff is, and at all the times herein mentioned has been, engaged in business in the Philippine Islands as a general merchant and as an exporter of Philippine products.

IV.

Between the first day of April, 1916, and the 30th day of June of the same year, plaintiff exported from the Philippine Islands merchandise, the growth and product of the Philippine Islands, of the value of ₱729,328.83.

V.

That said merchandise was at the time of its exportation from the Philippine Islands, during the course of the transportation thereof, and at the time of its arrival at the various ports of destination, the sole and exclusive property of plaintiff, and continued to be the property of plaintiff until sold by plaintiff to consumers in the countries to which said merchandise was exported.

VI.

6 Defendant herein, acting in his official capacity as Collector of Internal Revenue for the Philippine Islands, made demand upon plaintiff for the payment of a tax of 1% of the value of said merchandise so exported by plaintiff, to wit: the sum of ₱7,293.29, and threatened to enforce payment of said demand by administrative distraint of plaintiff's property.

VII.

On the 18th day of July, 1916, the plaintiff herein, for the purpose of avoiding the distraint of its property, paid defendant, involuntarily and under written protest, the said sum of ₱7,293.29, so demanded by him, and notified the defendant that unless the said protested payment was promptly refunded, suit would be brought for the recovery of same with interest and costs.

VIII.

Defendant overruled plaintiff's protest and refused, and still refuses, to refund the said sum of ₱7,293.29, or any part thereof.

For its third cause action, plaintiff avers:

I.

Plaintiff is a foreign corporation organized and existing under and by virtue of the lays of the Kingdom of Spain, duly licensed to do business in the Philippine Islands, and maintaining its principal office therein in the City of Manila.

7 II.

Defendant is, and at all the times hereinafter mentioned has been, the duly appointed and qualified Collector of Internal Revenue for the Philippine Islands, and is a resident of the City of Manila.

III.

Plaintiff is, and at all the times herein mentioned has been, engaged in business in the Philippine Islands, as a general merchant and as an exporter of Philippine products.

IV.

Between the first day of October, 1916, and the 31st day of December of the same year plaintiff exported from the Philippine Islands merchandise, the growth and product of the Philippine Islands, of the value of ₱1,736,554.00.

V.

That said merchandise was at the time of its exportation from the Philippine Islands, during the course of the transportation thereof, and at the time of its arrival at the various ports of destination, the sole and exclusive property of plaintiff, and continued to be the property of plaintiff, until sold by plaintiff to consumers in the countries to which said merchandise was exported.

8 VI.

Defendant herein, acting in his official capacity as Collector of Internal Revenue for the Philippine Islands, made demand upon plaintiff for the payment of a tax of 1% of the value of said merchandise so exported by plaintiff, to wit: the sum of ₱17,365.54, and threatened to enforce payment of said demand by administrative distraint of plaintiff's property.

VII.

On the 17th day of January, 1917, the plaintiff herein, for the purpose of avoiding the distraint of its property, paid defendant, involuntarily and under written protest, the said sum of ₱17,365.54, so demanded by him, and notified the defendant that unless the said

protested payment was promptly refunded, suit would be brought for the recovery of same with interest and costs.

VIII.

Defendant overruled plaintiff's protest and refused, and still refuses, to refund the said sum of ₱17,365.54, or any part thereof.

Wherefore, plaintiff prays for judgment against defendant upon the three causes of action herein set forth, in the aggregate sum of ₱28,555.13, together with interest at the legal rate on
9 each of the protested payments from the respective dates thereof until paid, and for the costs of suit.

Manila, P. I., January 23, 1917.

GILBERT, COHN & FISHER.
(Sgd.) F. C. FISHER, *p. p.*

On February 7, 1917, the Attorney General entered his appearance in the case as attorney for the defendant.

Thereafter, on February 12, 1917, the attorneys for both parties presented the following stipulation:

(Heading and Title Omitted.)

Stipulation.

Now come attorneys for plaintiff and defendant in the above-entitled cause and stipulate and agree that defendant may have a period of 60 days from date hereof in which to answer or demur to plaintiff's complaint filed herein.

Manila, February 12, 1917.

RAMÓN AVANCEÑA,
Attorney-General, for Defendant.
COHN & FISHER,
Attorneys for Plaintiff.

Thereafter, on April 18, 1917, the said Attorney-General, on behalf of the defendant, filed an answer to the complaint which reads as follows:

10 (Heading and Title Omitted.)

Answer.

Defendant, by the undersigned the Acting Attorney-General, in answer to plaintiff's complaint, alleges:

I.

That he admits the allegations contained in paragraphs I, II, III, VII and VIII of the first cause of action, and paragraphs I, II,

III, VII and VIII of the second cause of action, and paragraphs I, II, III, VII and VIII of the third cause of action of plaintiff's complaint.

II.

That he denies, all and singular, the other allegations contained in the said complaint, with the exceptions of those which in his special defense are expressly admitted.

III.

That as a special defense defendant alleges the following:

(*a*) That between the first day of January, 1916, and the 31st day of March of the same year, plaintiff consigned to its agents abroad merchandise, the growth and product of the Philippine Islands, of the value of ₱389,629.77.

(*b*) That the defendant made demand upon plaintiff for the payment of an internal revenue tax of one per centum of
11 the value of said merchandise consigned abroad as aforesaid.

(*c*) That thereafter, to wit, on the 18th day of April, 1916, plaintiff paid to defendant, under protest, the sum of ₱3,896.30 demanded of plaintiff as aforesaid.

(*d*) That the said protest was denied by defendant for the reason that the internal revenue tax so collected is legal.

(*e*) That between the first day of April, 1916, and the 30th day of June of the same year, plaintiff consigned to its agents abroad merchandise, the growth and product of the Philippine Islands, of the value of ₱44,928.00.

(*f*) That the defendant made demand upon plaintiff for the payment of an internal revenue tax of one per centum of the value of said merchandise consigned abroad as aforesaid.

(*g*) That thereafter, to wit, on the 18th day of July, 1916, plaintiff paid to defendant, under protest, the sum of ₱4,492.80 demanded of plaintiff as aforesaid.

(*h*) That the said protest was denied by defendant for the reason that the internal revenue tax so collected is legal.

12 (*i*) That between the first day of October, 1916, and the 31st day of December of the same year, plaintiff consigned to its agents abroad merchandise, the growth and product of the Philippine Islands, of the value of ₱1,736,554.00.

(*j*) That the defendant made demand upon plaintiff for the payment of an internal revenue tax of one per centum of the value of said merchandise consigned abroad as aforesaid.

(*k*) That thereafter, to wit, on the 17th of January, 1917, plaintiff paid to defendant, under protest, the sum of ₱17,365.54, demanded of plaintiff as aforesaid.

(*l*) That the said protest was denied by defendant for the reason that the internal revenue tax so collected is legal.

Wherefore, defendant asks the judgment of this Court that the plaintiff take nothing by its said complaint, and for the costs of this action.

Manila, P. I., April 14, 1917.

QUINTIN PAREDES,
Acting Attorney-General.

The case was set for hearing on July 12, 1917, and, on November 26, 1917, the Honorable James A. Ostrand, Judge of the Court of First Instance of Manila, Ninth Judicial District, entered judgment and decision in the case which reads as follows:

13 UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance for the City of Manila.

(Case No. 14759.)

COMPAÑÍA GENERAL DE TABACOS DE FILIPINAS, Plaintiff,

versus

JAMES J. RAFFERTY, as Collector of Internal Revenue for the Philippine Islands, Defendant.

Decision.

The above-entitled actions are brought to recover back internal revenue taxes paid on export consignments during the year 1916, under Section 2 of Act 2541, Section 3 of Act 2622, and Section 1614 of the Administrative Code of 1916. The plaintiffs argue that it could not have been the intention of the legislature in enacting the statutory provisions cited to impose taxes on export consignments, and that, if such was the intention, the provisions are unconstitutional.

14 There is no dispute as to the fact that all the taxes in question were levied on consignments abroad. From January 1st to February 3rd, 1916, they were levied and collected under Section 2 of Act 2541, of which the pertinent part reads as follows:

"* * * a tax of one per cent on the grow value in money of the commodities, goods, wares and merchandise sold, bartered or exchanged by them, such tax to be based on the actual selling price or value at which the things in question are disposed of * * *"

From February 4th to June 30th, 1916, the taxes were imposed under Section 3 of Act 2622, which reads in part:

"* * * a tax of one per cent of the gross value in money of the commodities, goods, wares and merchandise sold, bartered, consigned, or exchanged by them, such tax to be based on the actual selling price or value at which the things in question are disposed of * * *"

On July 1, 1916, the Administrative Code of 1916, went into effect, and in which the following language is used:

"* * * a tax of one per cent on the gross value in money of the commodities, goods, wares, and merchandise sold, bartered, exchanged, or consigned abroad by them, such tax to be based on the actual selling price or value at which the things in question are disposed of or consigned * * *"

15 Act No. 2622 was expressly ratified and confirmed by the Act of Congress of July 1, 1916, and, on August 29, 1916, Congress passed the so-called Jones Act, Section 11 of which provides that no export duties shall be levied or collected in the Philippine Islands.

As will be seen, from the standpoint of legislation bearing upon the tax in question, the year 1916 may be divided into four periods, viz: (1) From January 1st to February 3rd, when the tax was collected under Section 2 of Act 2541; (2) from February 4th till June 30th, when Section 3 of Act 2622, ratified by the Act of Congress of July 1, 1916, was in force; (3) from July 1st to August 28th, when the tax was imposed under the Administrative Code; and (4) from August 29th to December 31st, when the matter was governed by the same Code as affected by the Act of Congress of August 29th.

(1) As to the first period there can be no doubt but that the tax on consignments was improperly collected. The terms "sold, bartered or exchanged" do not necessarily include consignments.

(2) The statute controlling during the second period expressly imposes the tax on consignments, but it applied to all consignments alike and was not limited to export consignments. The
16 tax could, therefore, not be considered an export tax; it was not "laid upon the commodities as exports, or because of their exportation or intended exportation or upon persons who actually exported such commodities" (Muñoz & Co. vs. Hord, 12 Phil. Rep. at page 630). In the opinion of the Court it was clearly within the power of the Legislature to lay the tax provided for in Act 2622, and the terms of the Statute itself are too clear to require construction. The tax being valid, the plaintiffs can not, of course, recover back the amounts paid under said Act.

(3) There can be no doubt that the language used in the Administrative Code converts the tax into an export tax pure and simple. It is laid on consignments abroad, merely, and does not include domestic consignments.

As to the power of the local Legislature to provide for such a tax, there may be some doubt. The plaintiffs argue that, as the legislative powers delegated to the Philippine Government did not extend beyond the scope of the powers confirmed upon the Philippine Commission by the President's Instructions of April 7, 1900 (see Section 1 of Act of Congress of July 1, 1902), and that as it has been repeatedly held by the Supreme Court of the United States that the President, at the time of the issuance of the instructions, had no power to authorize the Commission to enact tariff laws,
17 neither the Philippine Commission nor the Philippine Legislature have ever possessed such authority.

It may be observed, however, that, while the United States Supreme Court, in a series of cases following the Fourteen Diamond Rings Case, 183 U. S., 176, held that the presidential power to levy duties on goods brought from the United States to the Philippine Islands ceased upon the exchange of ratifications of the Treaty of Peace with Spain, April 11, 1899, it has never held that the President did not have power to authorize any sort of tariff legislation after that date. The decision in the Fourteen Diamond Rings Case is based on the theory that the Philippine Islands ceased to be foreign territory after the ratification of the Treaty of Peace, and that the President, as commander in chief of our military forces, could not impose duties on imports from the United States to one of its own territories. The same reasoning would not apply to imports from foreign countries, and may not necessarily be applicable to taxes on exports to any country.

Taking into consideration the rule that statutes should not be held unconstitutional in merely doubtful cases, the undersigned is of the opinion that, until the enactment of the Jones Act, the clause of the Administrative Code, imposing a tax, on consignments
18 abroad, was constitutional and valid.

(4) Act of Congress of August 29, 1916 (the Jones Act), prohibits the levy and collection of taxes on exports from the Philippine Islands. The tax on consignment provided for in the Administrative Code, being as above stated an export tax, falls within the prohibition.

Wherefore, it is hereby ordered and adjudged that the defendant the Collector of Internal Revenue for the Philippine Islands return to the plaintiffs the amounts paid by them, respectively, as taxes on consignments imposed during the periods from January 1, 1916 till February 3, 1916, inclusive, and from August 29, 1916 till December 31, 1916, inclusive, and the return of which is demanded in the present action. No costs will be allowed.

Manila, P. I., November 26, 1917.

JAMES A. OSTRAND,
Judge.

On December 3, 1917, the counsel for the plaintiff presented an exception to the decision and motion for rehearing reading as follows:

(Heading and Title Omitted.)

Now comes the plaintiff in the above-entitled cause and respectfully excepts to the decision of this Court, dated the 26th day of November, 1917, to so much of said decision and judgment as declares legal and valid the taxes levied and collected upon merchandise exported by the plaintiff from the Philippine Islands during the prevalence of Act No. 2622 and Act No. 3657, and to so much thereof as denies to plaintiff the right to recover interest and costs of suit, and moves this Honorable Court to set aside the judgment rendered herein and grant a new trial of said action for the following reasons:

1. The evidence presented is insufficient to justify the decision.

2. That the decision is contrary to the law.

Manila, P. I., December 1, 1917.

CHARLES C. COHN,
Attorney for Plaintiff.

On December 7, 1917, the Acting Attorney-General, on behalf of the defendant, filed also the following exception to the decision and motion for rehearing:

(Heading and Title Omitted.)

Now comes the defendant in the above-entitled cause and respectfully excepts to the decision of this Court, dated the 26th day of November, 1917, to so much of said decision and judgment as declares that the amounts paid by the plaintiff as taxes on consignments imposed during the periods from January 1, 1916 till February 3, 1916, inclusive, and from August 29, 1916 till December 31, 1916, inclusive, have been illegally collected, and to so much thereof as orders the return of said amounts to the plaintiff; and moves this Honorable Court to set aside the judgment rendered herein and grant a new trial of said action for the following reasons:

1. The evidence presented is insufficient to justify the decision.

2. That the decision is contrary to the law.

Manila, P. I., December 6, 1917.

QUINTIN PAREDES,
Acting Attorney-General, for the Defendant.

Thereafter, on December 22, 1917, the foregoing motions for rehearing filed by both parties were denied by the trial court; to the order denying the said motions for rehearing both plaintiff and defendant excepted forthwith and gave notice of their intention to prepare and file a bill of exceptions, as follows:

(Heading and Title Omitted.)

Now comes the plaintiff in the above-entitled action and excepts to the order of this Court dated December 22nd, 1917, denying the motion for new trial filed by the plaintiff, and does
21 hereby give notice of its intention to prosecute a bill of exceptions for a review by the Supreme Court.

Manila, P. I., December 27, 1917.

CHARLES C. COHN,
Attorney for Plaintiff.

(Heading and Title Omitted.)

Now comes the defendant in the above-entitled action and excepts to the order of this Court dated December 22nd, 1917, denying the motion for new trial filed by the defendant, and does hereby give notice of his intention to prosecute a bill of exceptions for a review by the Supreme Court.

Manila, January 4, 1918.

QUINTÍN PAREDES,
Solicitor-General, for the Defendant.

Thereafter, on January 17, 1918, the counsel for both parties presented a stipulation in which they agreed, subject to the approval of the trial court, that the bill of exceptions heretofore to be filed by the plaintiff may likewise be considered as filed by the defendant.

22 On the same date, to wit, January 17, 1918, and within the time limited by law, the plaintiff and the defendant by their respective attorneys filed with the Court of First Instance the bill of exceptions requesting that the same be approved and certified, and forwarded thereafter to the Clerk of the Supreme Court of the Philippine Islands, together with all evidence given at the hearing of the case, which said evidence is thereby incorporated by reference into said bill of exceptions, so that the error complained of may be considered by the Supreme Court.

On January 30, 1918, the Court of First Instance approved, signed, and certified the said bill of exceptions, and the same, on March 23, 1918, was transmitted to the office of the Clerk of the Supreme Court of the Philippine Islands, together with the record of the case, for the purposes of the appeal.

On March 27, 1918, the case was duly docketed, on appeal, bearing No. 13889 of the General Register of the Supreme Court.

Thereafter, on April 4, 1918, the bill of exceptions was printed and filed.

On May 14, 1918, the plaintiff and appellant, through its attorney, filed its brief in the case assigning the following errors:

Specification of Errors.

23 Error No. 1. The trial court erred in denying unto plaintiff the refund of taxes paid on consigments abroad under Section 3 of Act No. 2622 from February 4 to June 30, 1916.

Error No. 2. The trial court erred in denying unto plaintiff the refund of taxes paid on consignments abroad under the Administrative Code of 1916 from July 1, 1916, to August 29, 1916.

Error No. 3. The trial court erred in refusing and declining to render a final and complete judgment capable of enforcement by execution.

Error No. 4. The trial court erred in denying to plaintiff the recovery of interest as compensation for the deprivation of moneys unlawfully exacted, and to recovery of costs.

Error No. 5. The trial court erred in denying the plaintiff's motion for a new trial.

On June 14, 1918, the Solicitor-General, on behalf of the defendant and appellant, filed also his brief in the case assigning the following errors:

Specification of Errors.

Error No. 1. The trial court erred in holding that the tax on consignments here involved was improperly collected during the period from January 1 to February 3, 1916.

Error No. 2. The trial court erred in holding that the tax on consignments provided for in the Administrative Code falls within the prohibition of the Act of Congress of August 29, 1916 (The Jones Law).

24 On August 1, 1920, the plaintiff and appellant, through its attorney, filed in the case its brief as appellee.

On November 13, 1918, the case was finally submitted to the Supreme Court, for decision on the merits.

Thereafter, on February 18, 1920, the Supreme Court of the Philippine Islands rendered its decision in the case, which said decision is in the words and figures following, to wit:

THE UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

In Banc.

G. R. No. 13889.

Submitted November 13, 1918.

Promulgated February 18, 1920.

Justices present: The Chief Justice, Cayetano S. Arellano and Messrs. Florentino Torres, E. Finley Johnson, Manuel Araullo, Thos. A. Street, Geo. A. Malcolm, and Ramón Avanceña.

COMPAÑIA GENERAL DE TABACOS DE FILIPINAS, Plaintiff and Appellant,

versus

JAMES J. RAFFERTY, As Collector of Internal Revenue for the Philippine Islands, Defendant and Appellant.

25 *Decision.*

JOHNSON, *J.*:

The purpose of this action was to recover an export tax, paid under protest, on certain merchandise, the growth and product of the Philippine Islands, exported from the Philippine Islands to various persons and firms without the Philippine Islands, for the following periods:

(1) From January 1, 1916, to March 31, 1916, amounting to ₱3,896.30;

(2) From April 1, 1916, to June 30, 1916, amounting to ₱7,293.29; and

(3) From October 1, 1916, to December 31, 1916, amounting to ₱17,365.54.

There is no dispute about the facts. They are admitted. After hearing the respective parties the Hon. James A. Ostrand, in a carefully prepared opinion, rendered a judgment in favor of the plaintiff and against the defendants, ordering a return of said export tax which had been paid, covering the following periods: (*a*) from January 1, 1916, to February 3, 1916, and (*b*) from October 1, 1916, to December 1, 1916. From that judgment both plaintiff and defendant appealed.

26 The export taxes collected by the defendant for the said periods (1) and (2) above, covering the period from January

1, 1916, to June 30, 1916, were collected under and by virtue of the provisions of section 2 of Act No. 2541 and section 3 of Act No. 2622. The contention of the plaintiff-appellant is, that inasmuch as said sections of said laws provide for an export tax upon merchandise, the product and growth of the Philippine Islands, they are illegal. That contention would be tenable (Macleon & Co., Inc. vs. Collector of Internal Revenue, R. G. No. 744; Crew Levick Co. vs. Pennsylvania, 245 U. S., 292; 256 Pa. St., 508; Smith, Bell & Co., Ltd. vs. Rafferty, R. G. No. 14466) except for the fact that said Acts were expressly ratified by an Act of Congress of the first of July, 1916 (39 Stat. at Large 286).

Said Act of Congress provides: "That the Internal Revenue taxes imposed by the Philippine Legislature under the law enacted by that body on December 21, 1915 (Act No. 2541) as amended by the law enacted by that body on February 4, 1916 (Act No. 2622), * * * are hereby legalized, and ratified and the collection of all such taxes heretofore or hereafter is hereby legalized, ratified and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

27 The Congress of the United States, therefore, having "legalized, ratified and confirmed" said Acts (2541 and 2622) so far as they affect the question before us, all collections of export tax made under and by virtue of said laws for the period of January 1, 1916, to June 30, 1916, are legal and the same cannot be recovered.

The collections for the periods (3) above mentioned, covering the period from October 1, 1916, to December 31, 1916, being an export tax, are expressly prohibited by the Act of Congress of August 29, 1916 (the Jones Law). (See Section 11 of Act of Congress of August 29, 1916, Vol. 12 Pub. Laws, p. 237.)

The export tax collected for the period from October 1, 1916, to December 31, 1916, being prohibited by said Act of Congress, the same was illegally collected and should be returned to the plaintiff, together with interest at the legal rate from the date of payment, the 17th day of January, 1917.

The error which the lower court fell into in ordering the return of the taxes collected for the period of January 1, 1916, to February 3, 1916, was due to an evident oversight of the fact that the Act of Congress above referred to of July, 1916 (39 Stat. at large, 286) expressly ratified Act No. 2541, of December 31, 1915, as well as Act No. 2622, of February 4, 1916.

28 In this connection we deem it important to note that the following Acts of the Philippine Legislature provided for an export tax upon merchandise, the produce of the Philippine Islands which was consigned or sold abroad:

(*a*) Section 2 of Act No. 2541;
(*b*) Section 3 of Act No. 2622;
(*c*) Section 1614 of Act No. 2657; and
(*d*) Section 1459 of Act No. 2711.

Section 2 of Act No. 2541 and Section 3 of Act No. 2622 were in force from the 1st day of January, 1916, to 30th day of June, 1916. Section 1614 of Act No. 2657, which took effect on the 1st day of July, 1916, was abrogated not only by the Jones Law, of August 29, 1916, but by section 1459 of Act No. 2711, which took effect on the 1st day of October, 1917.

Said Acts Nos. 2541 and 2622 were expressly ratified, legalized and confirmed by an Act of Congress of July 1, 1916. Section 1459 of Act No. 2711, which took effect October 1, 1917, was expressly ratified, legalized and confirmed by an Act of Congress of June 4, 1918.

Therefore, all export taxes collected prior to the 1st day of July, 1916, and all taxes collected after the 1st day of October, 1917, have been expressly legalized by said Acts of Congress, and any collections made upon exports during said periods cannot be recovered. The only period, therefore, during which the collection of the export tax was illegal was that from July 1, 1916, to September 30, 1917.

For the foregoing reasons the judgment of the lower court is hereby modified, and it is hereby ordered and decreed that judgment be rendered in favor of the plaintiff and against the defendant for the sum of ₱17,365.54, together with interest at 6% from the 17th day of January, 1917, until paid; without any finding as to costs.

Ten days after notification of decision let judgment be entered in conformity herewith, and, five days thereafter, let the record be returned to the court of origin for proper proceedings.

It is so ordered.

Arellano, Ch. J., and Torres, Araullo, Street, and Malcolm, JJ., concur.

On February 19, 1920, the parties were duly notified of the foregoing decision, and, on February 27 of the same year, the Attorney-General, on behalf of the defendant and appellant, filed the following motion for rehearing:

(Heading and Title Omitted.)

Motion for Rehearing.

Now comes the Attorney-General, on behalf of the defendant-appellant, and moves for a rehearing in the above-entitled action and for a reconsideration of the decision therein rendered by this Court, in so far as the said decision holds:

1. That the taxes collected on goods consigned abroad by plaintiff during the period from July 1, 1916, to September 30, 1917, are illegal and that they have not been ratified and validated by the Act of Congress of July 4, 1918.

2. That the defendant should pay interest on the amount of said taxes.

In support of this motion, we here reiterate the arguments on identical points contained in our motion for reconsideration in the

case of Smith, Bell & Co., Ltd. vs. James J. Rafferty, etc., R. G. No. 14466, to which the attention of the Court is respectfully invited.

Manila, February 27, 1920.

QUINTÍN PAREDES,
Attorney-General.

On March 11, 1920, the Supreme Court, upon considering the foregoing motion for rehearing passed a resolution denying the same.

Thereafter, on March 16, 1920, the Clerk of the Supreme Court of the Philippine Islands entered the final judgment in the case which reads as follows:

31 THE UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

(G. R. No. 13889.—March 16, 1920.)

COMPAÑÍA GENERAL DE TABACOS DE FILIPINAS, Plaintiff and Appellant,

versus

JAMES J. RAFFERTY, As Collector of Internal Revenue for the Philippine Islands, Defendant and Appellant.

Judgment.

The Court having regularly acquired jurisdiction for the trial of the above-entitled cause submitted by both parties for decision, after consideration thereof by the Court upon the record, its decision and order for judgment having been filed on the eighteenth day of February, A. D. nineteen hundred and twenty;

By virtue thereof it is hereby adjudged and decreed that the judgment of the Court of First Instance of Manila, dated the twenty-sixth day of November, nineteen hundred and seventeen, and from which the above-entitled appeal was taken, be, and the same is hereby, modified, and it is hereby ordered and decreed that a judgment be rendered in favor of the plaintiff and against the defend-
32 ant for the sum of ₱17,365.54 together with interest at 6% from the 17th day of January, 1917, until paid, without any finding as to costs.

[Seal of the Supreme Court of the Philippine Islands.]

V. ALBERT,
Clerk of the Supreme Court of the Philippine Islands.

Certified correct:

V. ALBERT,
Clerk of the Supreme Court of the Philippine Islands.

Thereafter, on March 18, 1920, the Attorney-General, on behalf of the defendant and appellant, filed the following petition:

(Heading and Title Omitted.)

Comes now the Attorney-General on behalf of the defendant and appellant and excepts to the decision of this court in denying his motion for a rehearing in the above-entitled action, and also excepts to the final judgment entered herein.

Notice is hereby given that the defendant intends to petition the Supreme Court of the United States for a writ of certiorari for the review of the decision and judgment of this court, and said defendant hereby makes application for the retention of the
33 record in said case in this court pending the preparation, printing and certification of said record and the presentation of said petition to the Supreme Court of the United States. The said defendant also prays for a stay of the judgment of this court during the pendency of the application for the writ of certiorari and of the proceedings in the Supreme Court of the United States.

Manila, March 16, 1920.

QUINTÍN PAREDES,
Attorney-General, Attorney for Defendant and Appellant.

And finally, on March 19, 1920, the Supreme Court, upon considering the above petition filed by the Attorney-General, on behalf of the defendant and appellant, passed a resolution ordering that the record of the case be retained in the office of the Clerk of said Court for a period of six months.

34 THE UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

I, V. Albert, Clerk of the Supreme Court of the Philippine Islands, do hereby certify that the foregoing thirty-three (33) printed pages contain a true and correct translation and transcript of the record of the case entitled Compañía General de Tabacos de Filipinas, Plaintiff and Appellant, versus James J. Rafferty, as Collector of Internal Revenue for the Philippine Islands, Defendant and Appellant, for refund of amount paid for taxes, bearing No. 13889 of the docket of this Supreme Court.

In witness whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the Philippine Islands this 26th day of July, A. D. nineteen hundred and twenty.

[Seal of the Supreme Court of the Philippine Islands.]

V. ALBERT.
Clerk of the Supreme Court of the Philippine Islands.

35 UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

I, V. Albert, Clerk of the Supreme Court of the Philippine Islands, in obedience to the writ of certiorari issued by the Supreme Court of the United States, dated the 18th day of November, 1920, in Cause No. 548 entitled James J. Rafferty, as Collector of Internal Revenue for the Philippine Islands, vs. Compania General de Tabacos de Filipinas, do hereby make return thereof to said Court, in accordance with the terms of the stipulation filed in said cause by the attorneys of record of the respective parties, the original of which stipulation is hereto attached, this eighteenth day of January in the year of our Lord one thousand nine hundred and twenty-one.

[Seal of the Supreme Court of the Philippine Islands.]

V. ALBERT,
Clerk of the Supreme Court of the Philippine Islands.

36 In the Supreme Court of the United States, October Term, 1920.

No. 548.

COMPANIA GENERAL DE TABACOS DE FILIPANAS, Plaintiff and Appellant,

v.

JAMES J. RAFFERTY, Collector of Internal Revenue for the Philippine Islands, Defendant and Appellant.

Stipulation that Return May Consist of Copy of Record on File.

It is hereby stipulated that the certified copy of the record of this case on application by defendant above named for writ of certiorari, certified July 26, 1920, by the Clerk of the Supreme Court of the Philippine Islands (the case being No. 13,889 in that court), which has been filed in the office of the Clerk of the Supreme Court of the United States, may be taken and deemed the return required by the writ of certiorari granted in the cause by the Supreme Court of the United States under date of November 18, 1920.

Dated Washington, D. C., November 22, 1920.

CLARENCE B. MILLER,
Attorney for Plaintiff-Appellee.

CHARLES MARVIN,
Attorney for Defendant-Appellant.

37 In the Supreme Court of the United States, October Term, 1920.

No. 548.

COMPANIA GENERAL DE TABACOS DE FILIPANAS, Plaintiff and Appellant,

v.

JAMES J. RAFFERTY, Collector of Internal Revenue for the Philippine Islands, Defendant and Appellant.

Stipulation that Return May Consist of Copy of Record on File.

It is hereby stipulated that the certified copy of the record of this case on application by defendant above named for writ of certiorari, certified July 26, 1920, by the Clerk of the Supreme Court of the Philippine Islands (the case being No. 13,889 in that court), which has been filed in the office of the Clerk of the Supreme Court of the United States, may be taken and deemed the return required by the writ of certiorari granted in the cause by the Supreme Court of the United States under date of November 18, 1920.

Dated Washington, D. C., November 22, 1920.

CLARENCE B. MILLER,
Attorney for Plaintiff-Appellee.
CHARLES MARVIN,
Attorney for Defendant-Appellant.

38 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the Philippine Islands, Greeting:

Being informed that there is now pending before you a suit in which Compania General de Tabacos de Filipinas is plaintiff and appellant, and James J. Rafferty, as Collector of Internal Revenue for the Philippine Islands, is defendant and appellant, which suit was removed into the said Supreme Court by virtue of appeals from the Court of First Instance of Manila, Ninth Judicial District and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, do hereby command you that you send without delay

39 to the said Supreme Court, as aforesaid the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the

United States, the eighteenth day of November in the year of our Lord one thousand nine hundered and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

40 [Endorsed:] File No. 27,905. Supreme Court of the United States, October Term, 1920. No. 548. James J. Rafferty, as Collector of Internal Revenue for the Philippine Islands, vs. Compania General de Tabacos de Filipinas. Writ of Certiorari.

41 [Endorsed:] File No. 27,905. Supreme Court U. S. October Term, 1920. Term No. 548. James J. Rafferty, as Collector etc., Petitioner, vs. Compania General de Tabacos de Filipinas. Writ of certiorari and return. Filed March 9, 1921.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 142.

JAMES J. RAFFERTY, AS COLLECTOR OF INTERNAL REVENUE FOR THE PHILIPPINE ISLANDS, PETITIONER,

vs.

VISAYAN REFINING COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

PETITION FOR CERTIORARI FILED SEPTEMBER 18, 1920.

CERTIORARI AND RETURN FILED MARCH 9, 1921.

(27,910)

(27,910)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 142.

JAMES J. RAFFERTY, AS COLLECTOR OF INTERNAL REVENUE FOR THE PHILIPPINE ISLANDS, PETITIONER,

vs.

VISAYAN REFINING COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

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1 THE UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

(Appellate Jurisdiction.)

G. R. No. 13887.

VISAYAN REFINING COMPANY, Plaintiff and Appellant,

versus

JAMES J. RAFFERTY, as Collector of Internal Revenue for the Philippine Islands, Defendant and Appellant.

For Refund of Amount Paid for Taxes.

Be it remembered that, on the dates respectively mentioned, the following proceedings were had in the above-entitled case, to wit:

On January 20, 1917, the plaintiff by its attorneys filed with the office of the Clerk of the Court of First Instance of Manila, Ninth Judicial District, the following complaint:

2 UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance of the City of Manila.

(Case No. 14749.)

VISAYAN REFINING COMPANY, Plaintiff,

versus

JAMES J. RAFFERTY, as Collector of Internal Revenue for the Philippine Islands, Defendant.

Plaintiff avers:

I.

Plaintiff is a foreign corporation organized and existing under the laws of the State of Delaware, United States of America, licensed to do business in the Philippine Islands.

II.

Plaintiff's principal place of business in the Philippine Islands is at Opon, in the Province of Cebú.

III.

3 Defendant is, and at all times herein mentioned has been, the duly appointed and qualified Collector of Internal Revenue for the Philippine Islands, and is a resident of the City of Manila, P. I.

IV.

Plaintiff's business in the Philippine Islands consists solely in the purchase of copra produced in the said Islands, the extraction of the oil content of such copra, and the exportation of the oil so obtained and of the by-products of the process of its extraction.

V.

In the month of November, 1916, plaintiff was the owner and was in the possession of a large quantity of cocoanut oil, to-wit, 2268.704 tons extracted by plaintiff from the Philippine copra purchased by it in the markets of the Philippine Islands.

VI.

Between the first day of November, 1916, and 31st day of December of said year, plaintiff exported the said 2268.704 tons of cocoanut oil from the port of Cebú, in the Philippine Islands, to the port of New York in the United States of America.

VII.

4 Said 2268.704 tons of cocoanut oil were, at the time of the shipment thereof, during the period of transportation, and upon the arrival thereof in the United States, the sole and exclusive property of plaintiff, and continued to be the property of plaintiff until sold to consumers within the United States of America.

VIII.

The value of the said 2268.704 tons of cocoanut oil was at the time of the shipment thereof the sum of One Million, One Hundred and Eighty-six Thousand, One Hundred and Seventy-one (₱1,186,171.00) Pesos, Philippine currency.

IX.

Defendant herein, acting in his official capacity as Collector of Internal Revenue for the Philippine Islands, made demand upon plaintiff for the payment of a tax of one per centum of the said value of the said 2268.704 tons of cocoanut oil, namely, the sum of Eleven Thousand Eight Hundred Sixty-one and 71/100 (₱11,861.71) Pesos, and threatened to enforce the payment of the said tax by administrative distraint of plaintiff's property.

X.

On the 9th day of January, 1917, plaintiff, to avoid the threatened distraint of its property, involuntarily and under written protest paid unto defendant the said sum of ₱11,861.71 demanded of it, and then and there notified defendant in writing that unless the said protested payment were refunded, suit would be brought for its recovery, with interest and costs.

XI.

Defendant overruled plaintiff's said protest and refused and still refuses to reund to plaintiff the said sum of ₱11,861.71 paid under protest, as aforesaid, or any part thereof.

Wherefore, plaintiff prays for judgment against defendant for the said sum of ₱11,861.71, together with interest thereon from the 9th day of January, 1917, and for the costs of suit.

Manila, P. I., January 20, 1917.

GILBERT, COHN & FISHER,
pp. F. C. FISHER,
Attorneys for Plaintiff.

On February 7, 1917, the Attorney General entered his appearance in the case as attorney for the defendant.

Thereafter, on February 12, 1917, the attorneys for both parties presented the following stipulation:

(Heading and Title Omitted.)

Now come attorneys for plaintiff and defendant in the above-entitled cause and stipulate and agree that defendant may have a period of 60 days from date hereof in which to answer or demur to plaintiff's complaint filed herein.

Manila, February 12, 1917.

RAMÓN AVANCEÑA,
Attorney-General,
For Defendant.
COHN & FISHER,
Attorneys for Plaintiff.

Thereafter, on April 18, 1917, the said Attorney-General, on behalf of the defendant, filed an answer to the complaint which reads as follows:

(Heading and Title Omitted.)

Answer.

Defendant, by the undersigned the Acting Attorney-General, in answer to plaintiff's complaint, alleges:

I.

That he admits the allegations contained in paragraphs I, II, III, V, X and XI of plaintiff's complaint.

II.

That he denies all and singular, the other allegations contained in the said complaint, with the exception of those which in his special defense are expressly admitted.

III.

That as a special defense defendant alleges the following:

7 (*a*) That in the month of November, 1916, plaintiff was the owner and was in possession of 2268.704 tons of cocoanut oil extracted by plaintiff from Philippine copra.

(*b*) That between the first day of November, 1916, and the 31st day of December of said year, plaintiff shipped the said 2268.704 tons of cocoanut oil from the port of Cebú in the Philippine Islands, consigned to its agents in the port of New York in the United States of America.

(*c*) That the value of said 2268.704 tons of cocoanut oil, as declared by plaintiff for taxation, was the sum of ₱1,186,171.00.

(*d*) That the defendant made demand upon plaintiff for the payment of an internal revenue tax of one per centum of the value of said cocoanut oil consigned abroad as aforesaid.

(*e*) That thereafter, to wit, on the 9th day of January, 1917, plaintiff paid to defendant, under protest, the sum of ₱11,861.71 demanded of plaintiff as aforesaid.

(*f*) That the said protest was denied by the defendant for the reason that the internal revenue tax so collected is legal.

Wherefore defendant asks the judgment of this Court that the plaintiff take nothing by its said complaint and for the costs of this action.

Manila, P. I., April 13, 1917.

QUINTÍN PAREDES,
Acting Attorney-General.

8 The case was set for hearing on July 12, 1917, and, on November 26, 1917, the Honorable James A. Ostrand, Judge of the Court of First Instance of Manila, Ninth Judicial District, entered judgment and decision in the case which reads as follows:

UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance for the City of Manila.

(Case No. 14749.)

VISAYAN REFINING COMPANY, Plaintiff,

versus

JAMES J. RAFFERTY, as Collector of Internal Revenue for the Philippine Islands, Defendant.

Decision.

The above-entitled actions are brought to recover back internal revenue taxes paid on export consignments during the year 1916, under Section 2 of Act 2541, Section 3 of Act 2622, and Section 1614 of the Administrative Code of 1916. The plaintiffs argue that it could not have been the intention of the legislator in enacting the statutory provisions cited to impose taxes on export consignments, and that, if such was the intention, the provisions are unconstitutional.

9 There is no dispute as to the fact that all the taxes in question were levied on consignments abroad. From January 1st to February 3rd, 1916, they were levied and collected under Section 2 of Act 2541, of which the pertinent part reads as follows:

"* * * a tax of one per cent on the gross value in money of the commodities, goods, wares and merchandise sold, bartered or exchanged by them, such tax to be based on the actual selling price or value at which the things in question are disposed of * * *"

From February 4th to June 30th, 1916, the taxes were imposed under Section 3 of Act 2622 which reads in part:

"* * * a tax of one per cent on the gross value in money of the commodities, goods, wares and merchandise sold, bartered consigned, or exchanged by them, such tax to be based on the actual selling price or value at which the things in question are disposed of * * *"

On July 1, 1916, the Administrative Code of 1916 went into effect, and in which the following language is used:

"* * * a tax of one per cent on the gross value in money of the commodities, goods, wares, and merchandise sold, bartered, exchanged, or consigned abroad by them, such tax to be based
10 on the actual selling price or value at which the things in question are disposed of or consigned * * *"

Act Number 2622 was expressly ratified and confirmed by the Act of Congress of July 1, 1916, and, on August 29, 1916, Congress passed the so-called Jones Act, Section 11 of which provides that no export duties shall be levied or collected in the Philippine Islands.

As will be seen, from the standpoint of legislation bearing upon the tax in question, the year 1916 may be divided into four periods, viz: (1) From January 1st to February 3rd, when the tax was collected under section 2 of Act 2541; (2) from February 4th till June 30th, when section 3 of Act 2622, ratified by the Act of Congress of July 1, 1916, was in force; (3) from July 1st to August 28th, when the tax was imposed under the Administrative Code; and (4) from August 29th to December 31st, when the matter was governed by the same Code, as affected by the Act of Congress of August 29th.

(1) As to the first period there can be no doubt but that the tax on consignments was improperly collected. The terms "sold, bartered or exchanged" do not necessarily include consignments.

(2) The statute controlling during the second period expressly imposes the tax on consignment, but it applied to all consign-
11 ments alike and was not limited to export consignments. The tax could, therefore, not be considered an export tax; it was not "laid upon the commodities as exports, or because of their exportation or intended exportation, or upon persons who actually exported such commodities" (Muñoz & Co. vs. Hord, 12 Phil. Rep. at page 630). In the opinion of the Court it was clearly within the power of the Legislature to lay the tax provided for in Act 2622, and the terms of the statute itself are too clear to require construction. The tax being valid, the plaintiffs can not, of course, recover back the amounts paid under said Act.

(3) There can be no doubt that the language used in the Administrative Code converts the tax into an export tax pure and simple. It is laid on consignments abroad, namely, and does not include domestic consignments.

As to the power of the local Legislature to provide for such a tax, there may be some doubt. The plaintiffs argue that as the legislative powers delegated to the Philippine Government did not extend beyond the scope of the powers conferred upon the Philippine Commission by the President's Instructions of April 7, 1900 (see Section 1 of Act of Congress of July 1, 1902), and that as it has been repeatedly held by the Supreme Court of the United States that
12 the President, at the time of the issuance of the instructions, had no power to authorize the commission to enact tariff laws, neither the Philippine Commission nor the Philippine Legislature have ever possessed such authority.

It may be observed, however, that while the United States Supreme Court, in a series of cases following the Fourteen Diamond Rings Case, 183 U. S. 176, held that the presidential power to levy duties on goods brought from the United States to the Philippine Islands ceased upon the exchange of ratifications of the Treaty of Peace with Spain, April 11, 1899, it has never held that the President did not

have power to authorize any sort of tariff legislation after that date. The decision in the Fourteen Diamond Rings Case is based on the theory that the Philippine Islands ceased to be foreign territory after the ratification of the Treaty of peace, and that the President, as commander in chief of our military forces, could not impose duties on imports from the United States to one of its own territories. The same reasoning would not apply to imports from foreign countries, and may not necessarily be applicable to taxes on exports to any country.

Taking into consideration the rule that statutes should not
13 be held unconstitutional in merely doubtful cases, the undersigned is of the opinion that, until the enactment of the Jones Act, the clause of the Administrative Code, imposing a tax on consignments abroad, was constitutional and valid.

(4) Act of Congress of August 29, 1916 (the Jones Act), prohibits the levy and collection of taxes on export from the Philippine Islands. The tax on consignments provided for in the Administrative Code, being as above stated an export tax, falls within the prohibition.

Wherefore, it is hereby ordered and adjudged that the defendant the Collector of Internal Revenue for the Philippine Islands return to the plaintiffs the amounts paid by them, respectively, as taxes on consignments imposed during the periods from January 1, 1916, till February 3, 1916, inclusive, and from August 29, 1916, till December 31, 1916, inclusive, and the return of which is demanded in the present action. No costs will be allowed.

Manila, P. I., November 26, 1917.

JAMES A. OSTRAND,
Judge.

On December 3, 1917, the counsel for the plaintiff presented an exception to the decision and motion for rehearing reading as follows:

14 (Heading and Title Omitted.)

Now comes the plaintiff in the above-entitled cause and respectfully excepts to the decision of this Court, dated the 26th day of November, 1917, to so much of said decision and judgment as declares legal and valid the taxes levied and collected upon merchandise exported by the plaintiff from the Philippine Islands during the prevalence of Act No. 2622 and Act No. 2657, and to so much thereof as denies to plaintiff the right to recover interest and costs of suit, and moves this Honorable Court to set aside the judgment rendered herein and grant a new trial of said action for the following reasons:

1. The evidence presented is insufficient to justify the decision.

2. That the decision is contrary to the law.

Manila, P. I., December 1 ,1917.

CHARLES C. COHN,
Attorney for Plaintiff.

On December 7, 1917, the Acting Attorney-General, on behalf of the defendant, filed also the following exception to the decision and motion for rehearing:

(Heading and Title Omitted.)

Now comes the defendant in the above-entitled cause and respectfully excepts to the decision of this Court, dated the 26th day
15 of November, 1917, to so much of said decision and judgment as declares that the amounts paid by the plaintiff as taxes on consignments imposed during the periods from January 1, 1916, till February 3, 1916, and from August 29, 1916, till December 31, 1916, inclusive, have been illegally collected, and to so much thereof as orders the return of said amounts to the plaintiff; and moves this Honorable Court to set aside the judgment rendered herein and grant a new trial of said action for the following reasons:

1. The evidence presented is insufficient to justify the decision.

2. That the decision is contrary to the law.

Manila, P. I., December 6, 1917.

QUINTÍN PAREDES,
Acting Attorney-General,
For the Defendant.

Thereafter, on December 22, 1917, the foregoing motions for rehearing filed by both parties were denied by the trial court; to the order denying the said motions for rehearing the plaintiff and the defendant excepted forthwith and gave notice of their intention to prepare and file a bill of exceptions, as follows:

(Heading and Title Omitted.)

Now comes the plaintiff in the above-entitled action and ex-
16 cepts to the order of this Court dated December 22nd, 1917, denying the motion for new trial filed by the plaintiff, and does hereby give notice of its intention to prosecute a bill of exceptions for a review by the Supreme Court.

Manila, P. I., December 27, 1917.

CHARLES C. COHN,
Attorney for Plaintiff.

(Heading and Title Omitted.)

Now comes the defendant in the above-entitled action and excepts to the order of this Court dated December 22nd, 1917, denying the motion for new trial filed by the defendant, and does hereby give notice of his intention to prosecute a bill of exceptions for a review by the Supreme Court.

Manila, January 4, 1918.

QUINTÍN PAREDES,
Solicitor-General,
For the Defendant.

Thereafter, on January 17, 1918, the counsel for both parties presented a stipulation in which they agreed, subject to the approval of the trial court, that the bill of exceptions heretofore to be filed by the plaintiff may likewise be considered as filed by the defendant.

On the same date, to wit, January 17, 1918, and within the time limited by law, both plaintiff and defendant by their respect-
17 ive attorneys filed with the Court of First Instance the bill of exceptions requesting that the same be approved and certified, and forwarded thereafter to the Clerk of the Supreme Court of the Philippine Islands, together with all evidence given at the hearing of the case, which said evidence is thereby incorporated by reference into said bill of exceptions, so that the error complained of may be considered by the Supreme Court.

On January 30, 1918, the Court of First Instance approved, signed, and certified the said bill of exceptions, and the same, on March 23, 1918, was transmitted to the Office of the Clerk of the Supreme Court of the Philippine Islands, together with the record of the case, for the purposes of the appeal.

On March 27, 1918, the case was duly docketed, on appeal, bearing No. 13887 of the General Register of the Supreme Court.

Thereafter, on April 6, 1918, the bill of exceptions was printed and filed.

On April 15, 1918, counsel for both parties filed a stipulation which was approved by the Supreme Court in its session of April 16, 1918. Said stipulation reads as follows:

18 UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

(G. R. No. 13887.)

VISAYAN REFINING COMPANY, Plaintiff and Appellant,

versus

JAMES J. RAFFERTY, Collector of Internal Revenue for the Philippine Islands, Defendant and Appellant.

(G. R. No. 13888.)

G. MARTINI, LIMITED, Plaintiff and Appellant,

versus

JAMES J. RAFFERTY, Collector of Internal Revenue for the Philippine Islands, Defendant and Appellant.

Stipulation.

Whereas the appeals of both plaintiff and defendant in the above-entitled actions involve no issues of fact, and are based upon questions

of law which are identical in each case with the issues presente
19 and discussed in the case wherein Compañía General d
Tabacos de Filipinas is plaintiff and appellant and James J
Rafferty, as Collector of Internal Revenue, is defendant and appel
lant, being Cause R. G. No. 13889 in this Honorable Court; and

Whereas the briefs on appeal in the above-entitled causes, if pre
sented and filed, would be mere replicas of the briefs in the said Caus
No. 13889.

Now, therefore, by and with the express approval and consent o
this Honorable Court which is hereby solicited and prayed for the re
spective parties hereto do stipulate and agree that the above-entitle
causes may be submitted for decision and determination in this Hon
orable Court upon the briefs to be filed in said Cause No. 13889 an
in accordance with the decision to be rendered in said last mentione
cause.

Manila, April 15, 1918.

CHARLES C. COHN,
Attorney for Plaintiff and Appellant.
QUINTÍN PAREDES,
Attorney for Defendant and Appellant.

On November 13, 1918, the case was finally submitted to the Su
preme Court, for decision on the merits.

Thereafter, on February 21, 1920, the Supreme Court of
20 the Philippine Islands rendered its decision in the case, which
said decision is in the words and figures following, to wit:

THE UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

In Banc.

G. R. No. 13887.

Submitted November 13, 1918; Promulgated February 21, 1920.

Justices Present: The Chief Justice, Cayetano S. Arellano, and
Messrs. Florentino Torres, E. Finley Johnson, Manuel Araullo,
Thos. A. Street, Geo. A. Malcolm, and Ramón Avanceña.

VISAYAN REFINING COMPANY, Plaintiff and Appellant,

versus

JAMES J. RAFFERTY, as Collector of Internal Revenue for the Philippine Islands, Defendant and Appellant.

Decision.

JOHNSON, *J.:*

This action was commenced in the Court of First Instance of the City of Manila on the 29th day of January, 1917. Its pur-
21 pose was to recover the sum of ₱11,861.71 which the plaintiff paid to the defendant under protest. The plaintiff alleges that the same was an export tax collected on certain merchandise, the growth and product of the Philippine Islands, exported from the Philippine Islands to various persons and firms without the Philippine Islands, for the following period: between the first day of November, 1916, and the 31st day of December, 1916.

There is no dispute about the facts. They are admitted. After hearing the respective parties the Hon. James A. Ostrand in a carefully prepared opinion, rendered a judgment in favor of the plaintiff and against the defendant for the sum of ₱11,861.71 with interest from the 9th day of January, 1917, without costs. From that judgment both the plaintiff and the defendant appealed.

The said taxes were collected under and by virtue of the provisions of Section 1469 of Act No. 2657, which took effect upon the first day of July, 1916. On the 29th day of August, 1916, the Congress of the United States adopted the Jones Law, Section 11 of which prohibited the collection of the export tax upon the exportation of products of the Philippine Islands. (Section 11 of the Act of Congress of August 29, 1916, Vol. 12, Public Laws, p. 237.) The prohibition contained in the Jones Law in force and effect during the
22 period for which taxes in question were collected. Said taxes being prohibited by the Jones Law, their collection was illegal, and should be returned to the plaintiff. (Macleod & Co. Inc. vs. Collector of Internal Revenue, R. G. No. 7444; Smith, Bell & Co., Ltd. vs. Rafferty, R. G. No. 14466; Compañía General de Tabacos de Filipinas vs. Rafferty, R. G. No. 13889; Crew Levick Co. vs. Pennsylvania, 245 U. S., 292; 256 Pa. St. 508.)

Therefore, and for the foregoing reasons, the judgment of the lower court is hereby affirmed, and it is hereby ordered and decreed that a judgment be entered in favor of the plaintiff and against the defendant for the sum of ₱11,861.71, with interest at the legal rate from the 9th day of January, 1917; without any finding as to costs.

Ten days after notification of decision let judgment be entered in conformity herewith, and, five days thereafter, let the record be returned to the court of origin for proper proceedings.

It is so ordered.

Arellano, Ch. J., and Torres, Araullo, Street, and Malcolm, JJ., concur.

On February 24, 1920, the parties were duly notified of the fo
going decision, and, on March 2 of the same year, the Att
23 ney-General, on behalf of the defendant and appellant, fil
the following motion for rehearing:

(Heading and Title Omitted.)

Motion for Rehearing.

Now comes the Attorney-General, on behalf of the defendant-a
pellant, and moves for a rehearing in the above-entitled case and f
a reconsideration of the decision therein rendered by this Court f
the following reasons:

1. The said decision is contrary to law.

2. The Court erred in finding that the taxes collected on goods co
signed abroad by plaintiff during the period from November 1,
December 31, 1916, are illegal, and in not finding that said tax
have been ratified and validated by the Act of Congress of June
1918.

3. The Court erred in adjudging interest to the plaintiff.

In support of this motion, we here reiterate the arguments
identical points contained in our motion for reconsideration in t
case of Smith, Bell & Co., Ltd. vs. James J. Rafferty, etc., R. G. N
14466, to which the attention of the Court, is respectfully invited.

Manila, March 1, 1920.

QUINTIN PAREDES,
Attorney-General.

24 On March 11, 1920, the Supreme Court, upon consideri
the foregoing motion for rehearing passed a resolution den
ing the same.

Thereafter, on March 18, 1920, the Clerk of the Supreme Court
the Philippine Islands entered the final judgment in the case whi
reads as follows:

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THE UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

March 18, 1920.

G. R. No. 13887.

VISAYAN REFINING COMPANY, Plaintiff and Appellant,

versus

JAMES J. RAFFERTY, Collector of Internal Revenue for the Philippine Islands, Defendant and Appellant.

Judgment.

The Court having regularly acquired jurisdiction for the trial of the above-entitled cause submitted by both parties for decision, after consideration thereof by the Court upon the record, its decision and order for judgment having been filed on the twenty-first day of February, A. D. nineteen hundred and twenty;

25 By virtue thereof it is hereby adjudged and decreed that the judgment of the Court of First Instance of Manila, dated the twenty-sixth day of November, nineteen hundred and seventeen, and from which the above-entitled appeal was taken, be, and the same is hereby, affirmed, and it is hereby ordered and decreed that a judgment be entered in favor of the plaintiff and against the defendant for the sum of ₱11,861.71, with interest at the legal rate from the 9th day of January, 1917, without any finding as to costs.

[SEAL.] V. ALBERT,
Clerk of the Supreme Court of the Philippine Islands.

Certified correct:

[Seal of the Supreme Court of the Philippine Islands.]

V. ALBERT,
Clerk of the Supreme Court of the Philippine Islands.

On March 24, 1920, the record of the case was returned to the Court of First Instance, as well as the original bill of exceptions, together with certified copies of the decision and judgment rendered by the Supreme Court therein, for proper proceedings.

Thereafter on March 31, 1920, the Attorney-General, on behalf of the defendant and appellant, filed the following petition:

26 (Heading and Title Omitted.)

Comes now the Attorney-General on behalf of the defendant and appellant and excepts to the decision of this court in denying his

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motion for a rehearing in the above-entitled action, and also exc
to the final judgment entered herein.

Notice is hereby given that the defendant intends to petition
Supreme Court of the United States for a writ of certiorari for th
view of the decision and judgment of this court, and said defen
hereby makes application for the retention of the record in said
in this court pending the preparation, printing and certificatio
said record and the presentation of said petition to the Supr
Court of the United States. The said defendant also prays for a
of the judgment of this court during the pendency of the ap
cation for the writ of certiorari and of the proceedings in the
preme Court of the United States.

Manila, March 16, 1920.

QUINTIN PAREDES,
Attorney General,
Attorney for Defendant and Appellan

And finally, on the same date, to wit, March 31, 1920, the
preme Court, upon considering the above petition filed by
27 Attorney-General, on behalf of the defendant and appell
passed a resolution ordering that the record of the case, wh
has been remanded to the Court of First Instance since the 24th
stant, be again required to be transmitted to the said Supreme Co
and that the execution of the judgment be stayed for a period of
months.

28 THE UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

I, V. Albert, Clerk of the Supreme Court of the Philippine Isla
do hereby certify that the foregoing twenty-seven (27) printed p
contain a true and correct translation and transcript of the recor
the case entitled Visayan Refining Company, Plaintiff and Ap
lant, versus James J. Rafferty, .s Collector of Internal Revenue
the Philippine Islands, Defendant and Appellant, for refund
amount paid for taxes, bearing No. 13887 of the docket of this
preme Court.

In witness whereof, I have hereunto set my hand and affi
the seal of the Supreme Court of the Philippine Islands this 2
day of July, A. D. nineteen hundred and twenty.

[Seal of the Supreme Court of the Philippine Islands.]

[SEAL.] V. ALBERT,
Clerk of the Supreme Court of the
Philippine Islands

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29 UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

I, V. Albert, Clerk of the Supreme Court of the Philippine Islands, in obedience to the writ of certiorari issued by the Supreme Court of United States, dated the 18th day of November, 1920, in Cause No. 553 entitled James J. Rafferty, as Collector of Internal Revenue for the Philippine Islands, vs. Visayan Refining Company, do hereby make return thereof to said Court, in accordance with the terms of the stipulation filed in said cause by the attorneys of record of the respective parties, the original of which stipulation is hereto attached, this eighteenth day of January in the year of our Lord one thousand nine hundred and twenty-one.

[Seal of the Supreme Court of the Philippine Islands.]

V. ALBERT,
Clerk of the Supreme Court of the Philippine Islands.

30 In the Supreme Court of the United States.

No. 553, October Term, 1920.

VISAYAN REFINING COMPANY, Plaintiff and Appellant,

v.

JAMES J. RAFFERTY, as Collector of Internal Revenue for the Philippine Islands, Defendant and Appellant.

Stipulation that Return May Consist of Copy of Record on File.

It is hereby stipulated that the certified copy of the record of this case on application by defendant above named for writ of certiorari, certified July 26, 1920, by the Clerk of the Supreme Court of the Philippine Islands (the case being No. 13,887 in that court), which has been filed in the office of the Clerk of the Supreme Court of the United States, may be taken and deemed the return required by the writ of certiorari granted in the cause by the Supreme Court of the United States under date of November 18, 1920.

Dated Washington, D. C.,
November 22, 1920.

CLARENCE B. MILLER,
Attorney for Plaintiff-Appellee.
CHARLES MARVIN,
Attorney for Defendant-Appellant.

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31 In the Supreme Court of the United States.

No. 553, October Term, 1920.

VISAYAN REFINING COMPANY, Plaintiff and Appellant,

v.

JAMES J. RAFFERTY, as Collector of Internal Revenue for the Philippine Islands, Defendant and Appellant.

Stipulation that Return May Consist of Copy of Record on File.

It is hereby stipulated that the certified copy of the record of this case on application by defendant above named for writ of certiorari, certified July 26, 1920, by the Clerk of the Supreme Court of the Philippine Islands (the case being No. 13,887 in that court), which has been filed in the office of the Clerk of the Supreme Court of the United States, may be taken and deemed the return required by the writ of certiorari granted in the cause by the Supreme Court of the United States under date of November 18, 1920.

Dated Washington, D. C.,
November 22, 1920.

CLARENCE B. MILLER,
Attorney for Plaintiff-Appellee.
CHARLES MARVIN,
Attorney for Defendant-Appellant.

32 UNITED STATES OF AMERICA, *ss.*:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the Philippine Islands, Greeting:

Being informed that there is now pending before you a suit in which Visayan Refining Company is plaintiff and appellant, and James J. Rafferty, as Collector of Internal Revenue for the Philippine Islands, is defendant and appellant, which suit was removed into the said Supreme Court by virtue of appeals from the Court of First Instance of Manila, Ninth Judicial District, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States.

33 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the eighteenth day of November, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

34 [Endorsed:] File No. 27,910. Supreme Court of the United States, No. 553, October Term, 1920. James J. Rafferty, as Collector of Internal Revenue for the Philippine Islands, vs. Visayan Refining Company. Writ of Certiorari. Insular Bureau. War Department. Nov. 30, 1920. 27262—75-G.

35 [Endorsed:] File No. 27,910. Supreme Court U. S. October Term, 1920. Term No. 553. James J. Rafferty, as Collector, etc., Petitioner, vs. Visayan Refining Company. Writ of certiorari and return. Filed March 9, 1921.

(4101)

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

JAMES J. RAFFERTY, AS COLLECTOR OF INTERNAL REVENUE FOR THE PHILIPPINE ISLANDS, *Petitioner*, *vs.* VISAYAN REFINING COMPANY *Respondent.*	No. 553.

Petition for Writ of Certiorari to the Supreme Court of the Philippine Islands.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of James J. Rafferty, as Collector of Internal Revenue for the Philippine Islands, for a Writ of Certiorari to the Supreme Court of the Philippine Islands (accompanied by a certified copy of the transcript of the record as an exhibit hereto) for the review of a final judgment rendered against him herein by that court on March 18, 1920, for Pesos 11,861.71 and interest, respectfully shows:

I.

Brief statement of the facts and circumstances. By Section 1614 of Philippine Act No 2657, the Philippine Administrative Code of 1916, approved February 24, 1916, and effective from July 1, 1916, to October 1, 1917, it was provided that all merchants not specifically exempted should pay a tax of one per cent on the value of the merchandise sold, bartered, exchanged or consigned abroad by them. During the period from November 1, 1916 to December 31, 1916, the respondent, a merchant not so exempted, exported from the Philippine Islands to New York, N. Y., cocoanut oil extracted from Philippine copra and purchased by respondent in the markets of the Philippine Islands, of the value of Pesos 1,186,171, which was its property and remained such until sold to consumers within the United States, and, your petitioner claims, respondent thereby became liable under said section to taxes amounting to Pesos 11,-861.17. On January 9, 1917, respondent paid said taxes under protest to your petitioner to avoid distraint of its property which he had threatened in order to enforce payment. By Section 11 of the Act of Congress of August 29, 1916, the (Philippine) Autonomy Act, in force from its date and during that period, it was provided among other things,

> "That no export duties shall be levied or collected on exports from the Philippine Islands." (39 Stat. 545, 548.)

II.

The proceedings which have been had in this action. This action was begun by respondent in the Court of First Instance of the City of Manila, Philippine Islands, January 20, 1917 against your petitioner to recover the sum so paid. To the complaint an answer was interposed in behalf of your petitioner by the Acting Attorney General of the Philippine Islands, admitting the facts stated above but setting up that respondent's protest had been denied for the reason that the taxes mentioned were legal taxes. Upon those pleadings a decision (which was also a judgment) was rendered by that Court on November 26, 1917, in favor of the respondent and against your petitioner for the said amount paid. (The decision rendered was in this cause, and in the cause of Compania General de Tabacos de Filipinas against your petitioner—No. 13889 on the docket of that court—for a review in which your petitioner has filed a petition to this court—No. 548, October Term, 1920.) A motion in behalf of your petitioner for rehearing was denied on December 22, 1917. From that judgment your petitioner appealed to the Supreme Court of the Philippine Islands. On March 18, 1920, final judgment of that court was duly entered, affirming the judgment appealed from with the modification that respondent recover from your

petitioner besides the sum paid (Pesos 11,861.71), interest from the date of payment thereof (January 9, 1917), without costs.

On February 24, 1920, a motion for rehearing was made before that court in behalf of your petitioner. which was denied.

On March 16 (18?) 1920, notice was duly filed in behalf of your petitioner to the effect that he intended to petition this court for a writ of certiorari for the review of said judgment of the Supreme Court of the Philippine Islands, which is the highest court in which a decision of this action was or is possible, unless the cause be reviewed by this court.

On March 31, 1920, the Supreme Court of the Philippine Islands directed a stay of the execution of the said judgment for a period of six months.

III.

Grounds of the decisions below. The reason given by both of the Philippine courts for their decisions, was in substance that the collection of the taxes in question was prohibited by the section referred to above of the Autonomy Act.

By stipulation the cause was submitted to the Supreme Court of the Philippine Islands on the briefs in the cause of Compania General de Tabacos de Filipinas referred to above.

IV.

The subsequent Act of Congress legalizing collections made of taxes under the section in question of the Philippine Act of 1916.

The Act of Congress of June 5, 1920, the Deficiency Appropriation Act of 1920, provides that the taxes imposed by Section 1614 of Philippine Act No 2657, the section under which the taxes the judgment requires your petitioner to repay were collected,

> "* * * are legalized and ratified, and the collection of all such taxes made under or by authority of such Act of the Philippine Legislature is legalized, ratified, and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed." (41 Stat, 1015, 1025.)

Since, as will be observed, that Act of Congress was not enacted until some months after the final judgment herein of the Supreme Court of the Philippine Islands had been duly perfected, and notice given of intention to apply to this court to review it, the obvious purpose of Congress in enacting it cannot be carried out in this case, unless a review be granted here.

V.

Effect in this cause of the ratification of 1920 by Congress. Had this cause been properly before the court of the Philippine Islands and not finally decided

at the time when Congress so legalized, ratified, and confirmed all collections of taxes made under the section under which the sum the judgment requires repaid was collected, then your petitioner respectfully submits, the Act of Congress of 1920 would clearly have been a valid and effective legalization of those collections and would not have rendered judgment herein against your petitioner.

That view accords with the decisions of the Supreme Court of the Philippine Islands in the cases of Smith, Bell & Company, Limited, and of Macleod & Company, Inc., against your petitioner's successor, about to be brought to the attention of this court, the former as No. 516 and the latter as No. 517, October Term, 1920, and with so much of the decision of that court in the cause of your petitioner against Smith, Bell & Company, Limited, about to be brought to the attention of this court as No. 544, October Term, 1920, as denied recovery, the taxes there in question having been paid in pursuance of the similar Philippine Act effective from October 1, 1917, and the reason for denial of recoveries being the ratification of those collections by similar Act of Congress of June 4, 1918 (40 Stat. 594, 597).

It also accords with so much of the decision of that court in the cause of your petitioner against Compania General de Tabacos de Filipinas mentioned above, as denied recovery for taxes paid in pursuance of

Section 2 of Act 2541 and Section 3 of Act 2622 of the Philippine Legislature, by reason of the ratification of those collections by a similar Act of Congress. (39 Stat. 262, 286).

Your petitioner also respectfully maintains that the Act of Congress of June 5, 1920 fully legalizes the collections of taxes in question in this action and calls for a reversal of the judgment herein, under the facts and circumstances of this cause.

VI.

Similar questions arise in several other pending cases which involve in the aggregate a very large sum. In the case of Compania General de Tabacos de Filipinas against your petitioner mentioned above, and in the case of Smith, Bell & Company, Limited, against your petitioner (No. 14466 in that court), that court affirmed judgments against your petitioner for Pesos 17,365.54 and Pesos 306,716.43 and interest, respectively (in the latter case also with costs), by reason of the collection of taxes from parties named in pursuance of said Section 1614 of the Philippine Administrative Code of 1916, making with the amount of the judgment herein a total of Pesos 356,943.68 ($167,971.84), exclusive of interest and costs, and your petitioner has filed applications to this court for writs of certiorari for the review of the judgments against him in the latter of those cases as

No. 548, October 1920 Term of this court, in the former as No. 544, October 1920 Term of this court.

Should your Honors reach the conclusion—contrary to the view of your petitioner—on the applications of Smith, Bell & Company, Limited, No 516 and Macleod & Company, Inc., No. 517, which are about to be presented as stated at V above, that the question there involved, the legality of collections under Section 1459 of the Philippine Administrative Code of 1917, calls for review of those cases by this court, then the amount indirectly involved in the decision of this and of your petitioner's two other applications referred to is much greater than Pesos 336,945.69. The question to be involved in the applications to be made by Smith, Bell & Company and Macleod & Company, is whether the Act of Congress of June 4, validated the collections of taxes it expressly purported to legalize as against claims on which suits were pending at the time of that enactment in which the Supreme Court of the Philippine Islands had not then rendered its decision, while in the cases of earlier origin in which your petitioner's applications are made, that court had acted before the Act of June 5, 1920, referring expressly to the Philippine law under which the taxes involved in them were collected. The Act of Congress of June 4, 1918, provided that taxes imposed under that section of the Administrative Code of 1917

> "* * * are hereby legalized and ratified, and the collection of all such taxes heretofore or hereafter is legalized, ratified, and confirmed * * * ." (40 Stat. 594, 597.)

Therefore, unless we may start in the latter cases with the proposition that the decisions below in the former were correct, as your petitioner insists, then *a fortiori* the latter cases of earlier origin which are here on your petitioner's applications involve the questions also involved in those of later origin, which were decided below in favor of his successor. Of those two cases (on the docket of this court), Case No. 516 was brought to recover Pesos 206,555.50 and Case No. 517, Pesos 97,018.65; and a large number of other cases for the recovery of taxes paid under section 1459 of the Administrative Code of 1917, are pending before the Philippine courts, involving already in the aggregate several million dollars, and that section is still in force.

VII.

The constitutionality and construction of Acts of Congress involved. One of the questions involved in this case is whether inasmuch as respondent had recovered final judgment for the refund of the taxes in question before the Act of Congress retrospectively legalizing their collection by express reference to the (Philippine) Act under which they had been collected, the enactment of that Act was within the power con-

ferred upon that body by the Constitution, especially in view of the fact that by the Philippine Autonomy Act Congress had previously prohibited any tax on exports from the Philippine Islands,—whether, in other words, respondent's judgment was such a vested interest as could not be disturbed by Congress. The views of your petitioner which he desires opportunity to urge before this court on review, are that no right to exemption from taxation on exports was conferred upon respondent by the Autonomy Act in such sense as to give him a vested interest in such exemption; that since the judgment therein had not yet been executed and its execution is still stayed, respondent can have no vested right in its enforcement superior to the right of Congress to legislate in the premises, at least for the insular possessions, to which, it has been settled, the Constitution as such does not apply as it does for the States and for the mainland of the United States proper; that in view of the special and peculiar relations of the Government of the Philippine Islands to the United States and of its courts to this court, the Act of Congress of June 5, 1920, is valid and effective as against respondent.

One question of construction directly involved is whether the Act of Congress of July 1, 1916, *supra* (before judgment herein), purporting to validate expressly collections under Section 2 of Act 2541 and Section 3 of Act 2622, should not be construed as

validating the Section of the Administrative Code of 1916 here in question, and the collection of taxes thereunder. The views of your petitioner are that that Act of Congress has that effect since in all respects here material the section in the Code of 1916 is substantially the same as the latter of the two sections of previous Philippine Acts referred to; and that the tax imposed by those sections is not a "tax on exports" within the meaning of Section 11 of the Autonomy Act as described briefly at I *supra*.

Another question of construction directly involved is whether the Act of Congress of June 5, 1920 (after judgment herein), purporting to validate expressly collections under Section 1614 of the Administrative Code of 1917 should not be construed as validating collections under the section of the Administrative Code of 1916 here in question. That is the proper construction according to the view of your petitioner, inasmuch as in all respects here material the section of the Code of 1916 is substantially the same as that of the Code of 1917.

VIII.

Interests of the United States and of a sovereignty directly subsidiary to it involved. The judgment of which a review is hereby sought was recovered for proceedings taken by your petitioner in pursuance of a law of the Government of the Philippine Islands, the most important of the insular

possessions which belong to and are under the protection of the United States.

It is your petitioner's view that in substance and effect this action is one against the Government of the Philippine Islands within the rule laid down by this court in *Lankford vs. Platte Iron Works Company, 235 U. S. 641* and other cases.

That, your petitioner insists, has an important bearing also in his favor upon the questions mentioned at VII *supra* and upon other questions involved.

IX.

The judgment is erroneous and unjust to your petitioner for the reasons which have been indicated above.

X.

Prayer. In view of the manifest importance to the jurisprudence of the United States and, through the principal of its territorial possessions, to the financial and moral interests of the nation, of certain of the questions involved as indicated above, the obvious novelty of some of them, the large amount involved, and the serious injustice to your petitioner of the judgment, your petitioner respectfully prays:

(a) That a writ of certiorari may be issued out of this court and under its seal, directed to the Supreme Court of the Philippine Islands, commanding that court to certify and send to this court, on a day certain to be therein designated, a full, true and com-

plete transcript of the record, and all the proceedings of that court in this cause, to the end that the judgment herein may be reviewed and determined by this court, in accordance with the statute in such case made and provided;

(b) That the judgment of the Supreme Court of the Philippine Islands and the whole thereof may be reversed by this court, and this cause remanded with the directions proper in the premises;

(c) That the stay of the execution of the judgment herein be continued pending the hearing and determination of this application, and if the application be granted, then also pending the final determination by the court on review;

(d) That your petitioner may have such other and further relief or remedy as to this court may seem just.

CHARLES MARVIN,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I have carefully examined the foregoing petition, and, in my opinion, the same is well founded and the case is one in which the prayer of the petitioner should be granted by this court.

CHARLES MARVIN,
Attorney for Petitioner.

Washington, D. C.,
September 18, 1920.

NOTICE OF SUBMISSION, ETC.

To VISAYAN REFINING COMPANY,
Respondent.

You will please take notice that a petition, of which the foregoing is a copy, together with a copy of the record in this case in the Supreme Court of the Philippine Islands, (bearing No. 13887 on the docket of that court), duly certified by the clerk thereof, was filed with the Clerk of the Supreme Court of the United States, on September 18, 1920, and that the petition will be submitted on October 18, 1920, at the opening of the court on that day at 12 o'clock noon, or as soon thereafter as counsel can be heard.

CHARLES MARVIN,
Attorney for Petitioner.

Washington, D. C.
October 2, 1920.

ADMISSION OF SERVICE.

Due service of printed copies of the foregoing petition and of the record in the Supreme Court of the Philippine Islands, and of the above notice, on this day of October, 1920, is hereby admitted.

_____

Attorney for Visayan Refining Company, Respondent.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 548.

JAMES J. RAFFERTY, AS COLLECTOR OF INTERNAL REVENUE FOR THE PHILIPPINE ISLANDS,
Petitioner,

vs.

COMPANIA GENERAL DE TABACOS DE FILIPINAS,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the Philippine Islands.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of James J. Rafferty, as Collector of Internal Revenue for the Philippine Islands, for a Writ of Certiorari to the Supreme Court of the Philippine Islands (accompanied by a certified copy of the transcript of the record as an exhibit hereto) for the review of a final judgment rendered against him herein by that court on March 16, 1920, for Pesos 17,365.54 and interest, respectfully shows:

I.

Brief statement of the facts and circumstances. By Section 1614 of Philippine Act No. 2657, the Philippine Administrative Code of 1916, approved February 24, 1916, and effective from July 1, 1916, to October 1, 1917, it was provided that all merchants not specifically exempted should pay a tax of one per cent on the value of the merchandise sold, bartered, exchanged or consigned abroad by them. During the period from October 1, 1916 to December 31, 1916, the respondent, a merchant not so exempted, exported from the Philippine Islands merchandise of the value of Pesos 1,736,554, which was its property and remained such until sold by it in the countries to which it was exported, and, your petitioner claims, respondent thereby became liable under said section to taxes amounting to Pesos 17,365.54. Respondent paid said taxes under protest to your petitioner to avoid distraint of its property which he threatened in order to enforce payment. By Section 11 of the Act of Congress of August 29, 1916, the (Philippine) Autonomy Act, in force from its date and during that period, it was provided among other things,

> "That no export duties shall be levied or collected on exports from the Philippine Islands." (39 Stat. 545, 548).

During prior periods from January 1, 1916 to June 30, 1916, the respondent exported from the Philip-

pine Islands merchandise of the value of Pesos 1,118,958.60. Under Section 2 of (Philippine) Act No. 2541 and Section 3 of (Philippine) Act No. 2622, the former in force from January 1, 1916 to February 3, 1916, and the latter from February 4, 1916 to June 30, 1916, which imposed taxes similar to those imposed by Section 1614 of Act No. 2657, mentioned above, and at the same rate, respondent became liable, as your petitioner claims, on account of such exports to taxes of Pesos 111,845.86. Respondent paid said taxes under protest to your petitioner to avoid distraint of its property, which he had threatened in order to enforce payment. But for reasons which will appear no review is here sought in respect to the taxes which accrued prior to October 1, 1916).

II.

The proceedings which have been had in this action. This action was begun by respondent in the Court of First Instance of the City of Manila, Philippine Islands, January 23, 1917, against your petitioner to recover the sums so paid. To the complaint an answer was interposed in behalf of your petitioner by the Acting Attorney General of the Philippine Islands, not denying the facts stated above, but setting up that the taxes mentioned were legal taxes. Upon those pleadings a decision (which was also a judgment) was rendered by that Court on No-

vember 26, 1917, in favor of the respondent and against your petitioner for the amount (Pesos 17,-365.54) paid on account of exports from October 1, 1916 to December 31, 1916, and for the amount (not stated in the decision) of the taxes paid on account of exports from January 1, 1916 to February 3, 1916, the claim for refund of taxes paid which had accrued from February 4, 1916 to June 30, 1916, being in effect denied. Motions in behalf of both parties for rehearing were denied on December 22, 1917. From that judgment both parties appealed to the Supreme Court of the Philippine Islands. On March 16, 1920 final judgment of that court was duly entered modifying the judgment appealed from so as to provide for the recovery by respondent from your petitioner of Pesos 17,365.54 with interest from the date of payment thereof (January 17, 1917) without costs.

On February 27, 1920, a motion for rehearing was made before that court in behalf of your petitioner, which was denied.

On March 18, 1920, notice was duly filed in behalf of your petitioner to the effect that he intended to petition this court for a writ of certiorari for the review of said judgment of the Supreme Court of the Philippines Islands, which is the highest court in which a decision of this action was or is possible, unless the cause be reviewed by this court.

On March 19, 1920, the Supreme Court of the Philippine Islands directed a stay of the execution of the said judgment for a period of six months.

III.

Grounds of the decisions below. The reason given by both of the Philippine courts for their decisions granting recovery of the taxes paid which had accrued during the period from October 1, 1916 to December 31, 1916, was in substance that their collection was prohibited by the section referred to above of the Autonomy Act, and for denying recovery of those paid which had accrued during the period from February 4, 1916 to June 30, 1916, that their collection had been legalized by Act of Congress of July 1, 1916. That Act, the Deficiency Appropriation Act of 1916, provided in effect that the internal revenue taxes imposed by Section 2 of Act No. 2541 as amended by Section 3 of Act No. 2622, referred to above,

> "* * * are hereby legalized and ratified, and the collection of all such taxes heretofore or hereafter is hereby legalized, ratified, and confirmed * * *" (39 Stat. 262, 286).

The Supreme Court of the Philippine Islands pointed out in its decision that the Court of First Instance had overlooked the fact that this Act of Congress legalized the collections involved for the period from January 1, 1916 to February 3, 1916, as well as for the period from February 4, 1916 to June 30, 1916, and modified the judgment on that point.

The court below disapproved the contention urged in behalf of your petitioner that the Act last mentioned in effect also legalized the collections made of taxes under the section of the Act of the Philippine Legislature mentioned above as in effect from July 1, 1916 to October 1, 1917 inasmuch as that section is substantially the same as the sections, the collection of taxes under which was expressly so legalized.

IV.

The subsequent Act of Congress legalizing collections made of taxes under the section in question of the Philippine Act of 1916.

The Act of Congress of June 5, 1920, the Deficiency Appropriation Act of 1920, provides that the taxes imposed by Section 1614 of Philippine Act No. 2657, the section under which the taxes the judgment requires your petitioner to repay were collected,

> "* * * are legalized and ratified, and the collection of all such taxes made under or by authority of such Act of the Philippine Legislature is legalized, ratified, and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed." (41 Stat. 1015, 1025.)

Since, as will be observed, that Act of Congress was not enacted until some months after the final judgment herein of the Supreme Court of the Philippine Islands had been fully perfected, and notice given of

intention to apply to this court to review it, the obvious purpose of Congress in enacting it cannot be carried out in this case, unless a review be granted here.

V.

Effect in this cause of the ratification of 1920 by Congress. Had this cause been properly before the court of the Philippine Islands and not finally decided at the time when Congress so legalized, ratified, and confirmed all collections of taxes made under the section under which the collections the judgment requires repaid were made, the Supreme Court of the Philippine Islands, at any rate, would presumably have found the Act of Congress of 1920 a valid and effective legalization of those collections and would not have rendered judgment herein against your petitioner. This follows from the view taken by that court and by the court below it, as pointed out at III above, of the effect of the similar ratification by Congress of collections made under Section 2 of Act No. 2541 and Section 3 of Act No. 2622 of the Philippine Legislature.

That view accords also with the decisions of the Supreme Court of the Philippine Islands in the cases of Smith, Bell & Company, Limited, and of Macleod & Company, Inc., against your petitioner's successor, both about to be brought to the attention of this court, the former as No. 516 and the latter as No. 517,

October Term, 1920, and with so much of the decision of that court in Smith, Bell & Company, Limited, against your petitioner, about to be brought to the attention of this court on his application, as No. 544, October 1920 Term, as denied recovery, the taxes there in question having been paid in pursuance of the similar Philippine Act effective from October 1, 1917, and the reason for denial of recoveries being the ratification of those collections by similar Act of Congress of June 4, 1918 (40 Stat. 594, 597).

VI.

Similar questions arise in several other pending cases which involve in the aggregate a very large sum. In Visayan Refining Company against your petitioner, No. 13887 in the Supreme Court of the Philippine Islands, and in Smith, Bell & Company, Limited, against your petitioner, No. 14466 in that Court, that court has affirmed judgments against your petitioner for Pesos 11,861.71 and Pesos 306,716.43 and interest, respectively (in the latter case also with costs), by reason of the collection of taxes from the parties named in pursuance of said Section 1614 of the Philippine Administrative Code of 1916, making with the amount of the judgment herein a total of Pesos 336,943.68 ($167,971.84), exclusive of interest and costs; and your petitioner has filed an application to this court for a writ of certiorari for the review of the judgments against him in the latter of those cases,

as No. 544, October 1920 Term of this Court, and is about to file a similar application in the former.

Should your Honors reach the conclusion—contrary to the view of your petitioner—on the applications of Smith, Bell & Company, Limited, No. 516 and Macleod & Company, Inc., No. 517, which are about to be presented as stated at V *supra*, that the question there involved, the legality of collections under Section 1459 of the Philippine Administrative Code of 1917, calls for review of those cases by this court, then the amount indirectly involved in the decision of this and of your petitioner's other applications referred to is much greater. The question involved in the applications to be made by Smith, Bell & Company, and Macleod & Company, is whether the Act of Congress of June 4, 1918, validated the collections of taxes it expressly purported to legalize as against claims on which suits were pending at the time of that enactment in which the Supreme Court of the Philippine Islands had not yet rendered decision, while in the cases of earlier origin in which your petitioner's applications are made and to be made, that court had acted. The Act of Congress last mentioned provided that taxes imposed under that section of the Administrative Code of 1917

> "* * * are hereby legalized and ratified, and the collection of all such taxes heretofore or hereafter is legalized, ratified, and confirmed hereby * * *" (40 Stat. 594, 597).

Therefore, unless we may start in the latter cases with the proposition that the decisions below in the former were correct, as your petitioner believes, then *a fortiori* the cases of the earlier origin coming here on your petitioner's applications involve the questions involved in those of the later origin, which were decided below in favor of his sucessor. Case No. 516 was brought to recover Pesos 206,555.50 and Case No. 517, Pesos 97,018.65; and a large number of other cases for the recovery of taxes paid under section 1459 of the Administrative Code of 1917 which is still in force are pending before the Philippine courts, involving in the aggregate several million dollars.

VII.

The constitutionality and construction of Acts of Congress involved. One of the questions involved in this case is whether inasmuch as respondent had recovered final judgment for the refund of the taxes in question before the Act of Congress retrospectively legalizing their collection by express reference to the (Philippine) Act under which they had been collected, the enactment of that Act was within the power conferred upon that body by the Constitution, especially in view of the fact that by the Philippine Autonomy Act Congress had previously prohibited any tax on exports from the Philippine Islands,—whether, in other words, respondent's judgment was such a vested interest as could not be disturbed by Congress. The

views of your petitioner which he desires opportunity to urge before this court on review, are that no right to exemption from taxation on exports was conferred upon respondent by the Autonomy Act in such sense as to give him a vested interest in such exemption; that since the judgment therein had not yet been executed and its execution is still stayed, respondent can have no vested right in its enforcement superior to the right of Congress to legislate in the premises, at least for the insular possessions, to which, it has been settled, the Constitution as such does not apply as it does for the States and for the mainland of the United States proper; that in view of the special and peculiar relations of the Government of the Philippine Islands to the United States and of its courts to this court, the Act of Congress of June 5, 1920 is valid and effective as against respondent.

A question of construction directly involved is whether the Act of Congress of July 1, 1916 (before judgment herein), purporting to validate expressly collections under section 2 of Act 2541 and Section 3 of Act 2622, should not be construed as validating the Section of the Administrative Code of 1916 here in question, and the collection of taxes thereunder. The views of your petitioner are that that Act of Congress has that effect since in all respects here material the section in the earlier code of 1916 is substantially the same as those of the earlier Acts

referred to; and that the tax imposed by those sections is not a "tax on exports" within the meaning of Section 11 of the Autonomy Act as described briefly at I *supra*.

VIII.

Interests of the United States and of a sovereignty directly subsidiary to it involved. The judgment of which a review is hereby sought was recovered for proceedings taken by your petitioner in pursuance of a law of the Government of the Philippine Islands, the most important of the insular possessions which belong to and are under the protection of the United States.

It is your petitioner's views that in substance and effect the section is one against the Government of the Philippine Islands within the rule laid down by this court in *Lankford vs. Platte Iron Works Company, 235 U. S. 461* and other cases.

That, your petitioner insists, has an important bearing also in his favor upon the qustions mentioned at VII *supra* and upon other questions involved.

IX.

The judgment is erroneous and unjust to your petitioner for the reasons which have been indicated above.

X.

Prayer. In view of the manifest importance to the jurisprudence of the United States and, through the principal of its territorial possessions, to the financial

and moral interests of the Nation, of certain of the questions involved as indicated above, the obvious novelty of some of them, the large amount involved, and the serious injustice to your petitioner of the judgment, your petitioner respectfully prays:

(a) That a writ of certiorari may be issued out of this court and under its seal, directed to the Supreme Court of the Philippine Islands, commanding that court to certify and send to this court, on a day certain to be therein designated, a full, true and complete transcript of the record, and all the proceedings of that court in this cause, to the end that in so far as it includes judgment against your petitioner, the same may be reviewed and determined by this court, in accordance with the statute in such cases made and provided;

(b) That so much of the judgment of the Supreme Court of the Philippine Islands as adjudges recovery by the respondent from your petitioner, may be reversed by this court, and this cause remanded with the directions proper in the premises;

(c) That the stay of the execution of the judgment herein be continued pending the hearing and determination of this application, and if the application be granted, then also pending the final determination by the court on review;

(d) That your petitioner may have such other and further relief or remedy as to this court may seem just.

CHARLES MARVIN,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I have carefully examined the foregoing petition, and, in my opinion, the same is well founded and the case is one in which the prayer of the petitioner should be granted by this court.

CHARLES MARVIN,
Attorney for Petitioner.

Washington, D. C.
September 16, 1920.

NOTICE OF SUBMISSION, ETC.

To Compania General de Tabacos de Filipinas,
Respondent.

You will please take notice that a petition, of which the foregoing is a copy, together with a copy of the record in this case in the Supreme Court of the Philippine Islands, (bearing No. 13889 on the docket of that court) duly certified by the clerk thereof, was filed with the clerk of the Supreme Court of the United States on September 16, 1920, and that the petition will be submitted on *October 18, 1920*, at the opening of the court on that day at 12 o'clock noon, or as soon thereafter as counsel can be heard.

Charles Marvin,
Attorney for Petitioner.

Washington, D. C.
October 2, 1920.

ADMISSION OF SERVICE.

Due service of printed copies of the foregoing petition and of the record in the Supreme Court of the Philippine Islands, and of the above notice, on this .....day of October, 1920, is hereby admitted.

Attorney for Compania General de Tabacos de Filipinas, Respondent.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

JAMES J. RAFFERTY, COLLECTOR OF INTERNAL REVENUE FOR THE PHILIPPINE ISLANDS, *Petitioner*,

vs.

SMITH, BELL & COMPANY, LIMITED, *Respondent.*

No. 544.

Petition for Writ of Certiorari to the Supreme Court of the Philippine Islands.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of James J. Rafferty, as Collector of Internal Revenue for the Philippine Islands, for a Writ of Certiorari to the Supreme Court of the Philippine Islands (accompanied by a certified copy of the transcript of the record as an exhibit hereto) for the review of a final judgment rendered against him herein by that court on March 15, 1920 for Pesos 306,716.46 with interest and costs, respectfully shows:

I.

Brief statement of the facts and circumstances. By Section 1614 of Philippine Act No. 2657, the Philippine Administrative Code of 1916, approved February 24, 1916, and effective from July 1, 1916, to October 1, 1917, it was provided that all merchants not specifically exempted should pay a tax of one per cent on the value of the merchandise sold, bartered, exchanged or consigned abroad by them. During periods from October 1, 1916 to September 30, 1917, the respondent, a merchant not so exempted, exported from the Philippine Islands to various persons and firms without the Philippine Islands, merchandise of the value of Pesos 30,671.643, and, your petitioner claims, thereby became liable under said section to taxes amounting to Pesos 306,716.43. Respondent paid said taxes to avoid penalties and under protest, the ground assigned in the protests being that said taxes were taxes on exports from the Philippine Islands the levy or collection of which was prohibited by the Act of Congress of August 29, 1916. The Autonomy Act (Philippine) Section 11 of the Act last mentioned provides among other things,

> "That no export duties shall be levied or collected on exports from the Philippine Islands." (39 Stat. 545, 548.)

(During the subsequent period from October 1, 1917 to December 31, 1917, the respondent exported

from the Philippine Islands to various persons and firms without the Philippine Islands merchandise of the value of Pesos 10,646,367, and as your petitioner claims, thereby became liable under Section 1459 of Philippine Act No. 2711, the Philippine Administrative Code of 1917, and in force since October 1, 1917,—a section which your petitioner insists is substantially the same as Section 1614 of the Administrative Code of 1916, as will be pointed out—to taxes of Pesos 106,463.62. Respondent paid such taxes to avoid penalties and under protest similar to those which have been mentioned. But for reasons which will appear no review is here sought in respect to the taxes which have accrued subsequent to September 30, 1917.)

II.

The proceedings which have been had in this action. This action was begun by respondent in the Court of First Instance of the City of Manila, Philippine Islands, February 7, 1918, against your petitioner to recover the sums so paid. To the complaint first a demurrer, and after that had been overruled, an answer were interposed in behalf of your petitioner by the Acting Attorney General of the Philippine Islands, the answer admitting the facts alleged but setting up that they were insufficient to constitute a cause of action. Upon the issue so

joined a decision (which was also a judgment) was rendered by that court on July 25, 1918, in favor of the respondent and against your petitioner for the said sum of Pesos 306,716.43, the claim for refund of taxes paid which had accrued subsequent to October 1, 1917, being in effect denied. A motion in behalf of your petitioner for rehearing was denied on August 10, 1918. From that judgment both parties appealed to the Supreme Court of the Philippine Islands. On March 15, 1920 judgment of that court was duly entered affirming the judgment appealed from with interest and with costs, motion in behalf of your petitioner for rehearing having been denied on January 27, 1920.

On March 18, 1920, notice was duly filed in behalf of your petitioner to the effect that he intended to petition this court for a writ of certiorari for the review of said judgment of the Supreme Court of the Philippine Islands, which is the highest court in which a decision of this action was or is possible, unless the cause be reviewed by this court.

On March 19, 1920, the Supreme Court of the Philippine Islands directed a stay of the execution of the said judgment for a period of six months.

III.

Grounds of the decision below. The reason given by both of the Philippine courts for their decisions

in regard to the taxes which had accrued prior to October 1, 1917, was in substance that their collection was prohibited by the section referred to above of the Autonomy Act, and in regard to those which had accrued subsequently to September 30, 1917, that their collection had been legalized by Act of Congress of June 4, 1918. That Act, the Deficiency Appropriation Act of 1918, provided that the taxes imposed by the section referred to above of the Act of the Philippine Legislature which took effect October 1, 1917,

> "* * * are hereby legalized and ratified, and the collection of all such taxes heretofore or hereafter is legalized, ratified, and confirmed hereby * * *" (40 Stat. 594, 597).

The court below disapproved the contention urged in behalf of your petitioner that the Act last mentioned in effect also legalized the collections made of taxes under the section of the prior Act of the Philippine Legislature mentioned above inasmuch as that section is substantially the same as the section, the collection of taxes under which was expressly so legalized.

IV.

The subsequent Act of Congress legalizing collections made of taxes under the section in question of the Philippine Act of 1916.

The Act of Congress of June 5, 1920, the Deficiency Appropriation Act of 1920, provides that the taxes imposed by Section 1614 of Philippine Act No. 2657, the section under which the taxes the judgment requires your petitioner to repay were collected,

> "* * * are legalized and ratified, and the collection of all such taxes made under or by authority of such Act of the Philippine Legislature is legalized, ratified, and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed." (41 Stat. 1015, 1025.)

Since, as will be observed, that Act of Congress was not enacted until some months after the final judgment herein of the Supreme Court of the Philippine Islands had been fully perfected, and notice given of intention to apply to this court to review it, the obvious purpose of Congress in enacting it cannot be carried out in this case, unless a review be granted here.

V.

Effect in this cause of the ratification of 1920 by Congress. Had this cause been properly before the court of the Philippine Islands and not finally decided at the time when Congress so legalized, ratified, and confirmed all collections of taxes made under the section under which the collections the judgment requires repaid were made, the Supreme Court of the

Philippine Islands at any rate would presumably have found the Act of Congress of 1920 a valid and effective legalization of those collections and would not have rendered judgment herein against your petitioner. This follows, from the view taken by that court and by the court below it, as pointed out at III above, of the effect of the similar ratification by Congress of collections made under the Philippine Administrative Code of 1917.

That view accords also with the decisions of the Supreme Court of the Philippine Islands in the cases of Smith, Bell & Company, Limited, and of Macleod & Company, Inc., against your petitioner's successor, both about to be brought to the attention of this court, the former as No. 516 and the latter as No. 517, October Term, 1920.

VI.

Similar questions arise in several other pending cases which involve in the aggregate a very large sum. In Compania General de Tabacos de Filipinas against your petitioner, No. 13889 in the Supreme Court of the Philippine Islands (No. , October 1920 Term of this Court), and in Visayan Refining Company against your petitioner, No. 13887 in that court (No. , October 1920 Term of this Court), that court has affirmed judgments against your petitioner for Pesos 17,365.54 and Pesos 11,861.71 and interest, respectively, by reason of the collection of taxes from

the plaintiffs therein, pursuant to said Section 1614 of the Philipine Administrative Code of 1916, making with the amount of the judgment herein a total of Pesos 335,943.68 ($167,971.84), exclusive of interest and costs, and your petitioner is about to make applications to this Court for writs of certiorari for the review of the judgments against him in those cases.

Should your Honors reach the conclusion—contrary to the view of your petitioner—on the applications of Smith, Bell & Company, Limited, No. 516 and Macleod & Company, Inc., No. 517, which are about to be presented as stated at V above, that the question there involved calls for review of those cases by this court, then the amount indirectly involved in the decision of this and your petitioner's other applications referred to is much greater. The question involved in the former applications is whether the Act of Congress of June 4, 1918, described at III above, validated the collections of taxes it expressly purported to legalize as against claims on which suits were pending at the time of that enactment in which the Supreme Court of the Philippine Islands had not yet rendered decision, while in the cases of earlier origin in which the applications of your petitioner are made, that court had acted; so that unless we may start in the latter cases with the proposition that the decisions below in the former were correct, as your

petitioner believes, then *a fortiori* the cases of earlier origin involve the questions involved in those of later origin. Case No. 516 was brought to recover Pesos 206,555.30 and Case No. 517 Pesos 97,018.85; and a large number of other cases for the recovery of taxes paid under section 1459 of the Administrative Code of 1917 which is still in force are pending before the Philippine courts, involving in the aggregate several million dollars.

VII.

The constitutionality and construction of Acts of Congress involved. One of the questions involved in this case is whether in view of the fact that respondent had recovered final judgment for the refund of the taxes in question before the Act of Congress retrospectively legalizing their collection by express reference to the (Philippine) Act under which they had been collected, the enactment of that Act was within the power conferred upon that body by the Constitution, especially in view of the fact that by the Philippine Autonomy Act of Congress had previously prohibited any tax on exports from the Philippine Islands,—whether, in other words, respondent's judgment was such a vested interest as could not be disturbed by Congress. The views of your petitioner which he desires opportunity to urge before this court on review, are that respondent can have no vested interest in exemption from taxation on exports;

that since the judgment had not yet been executed and its execution is still stayed, respondent can have no vested right in its enforcement superior to the right of Congress to legislate in the premises, at least for the insular possessions, to which, it has been settled, the Constitution as such does not apply as it does for the States and the mainland of the United States proper; that in view of the special and peculiar relations of the Government of the Philippine Islands to the United States and of its courts to this court, the Act of Congress of June 5, 1920 is valid and effective as against respondent.

A question of construction directly involved is whether the Act of Congress of June 4, 1918 (before the judgment herein), purporting to validate expressly collections under the section of the Administrative Code of 1917, should not be construed as validating the section of the Administrative Code of 1916 here in question. The views of your petitioner are that that Act of Congress has that effect since in all respects here material the section in the earlier code is substantially the same as that of the later code; and that the tax imposed by those sections is not a "tax on exports" within the meaning of Section 11 of the Autonomy Act described briefly at I *supra*. A similar question arises respecting Act of Congress of July 1, 1916 (39 Stat. 262, 286).

VIII.

Interests of the United States and of a Sovereignty Directly Subsidiary to it, Involved. The judgment of which a review is hereby sought was recovered for proceedings taken by your petitioner in pursuance of a law of the Government of the Philippine Islands, the most important of the insular possessions which belong to and are under the protection of the United States.

It is your petitioner's view that in substance and effect the action is one against the Government of the Philippine Islands within the rule laid down by this court in *Lankford vs. Platte Iron Works Company, 235 U. S. 461* and other cases.

That, your petitioner insists, has an important bearing also in his favor upon the questions mentioned at VII *supra* and upon other questions involved.

Also for that reason costs should not have been awarded against your petitioner.

IX.

The judgment is erroneous and unjust to your petitioner for the reasons which have been indicated above.

X.

Prayer. In view of the manifest importance to the jurisprudence of the United States and, through the principal of its territorial possessions, to the financial and moral interests ot the Nation, of certain

of the questions involved as indicated above, the obvious novelty of some of them, the large amount involved, and the serious injustice to your petitioner of the judgment, your petitioner respectfully prays:

(a) That a writ of certiorari may be issued out of this court and under its seal, directed to the Supreme Court of the Philippine Islands, commanding that court to certify and send to this court, on a day certain to be therein designated, a full, true and complete transcript of the record, and all the proceeding of that court in this cause, to the end that in so far as it includes judgment against your petitioner, the same may be reviewed and determined by this court, in accordance with the statute in such case made and provided;

(b) That so much of the judgment of the Supreme Court of the Philippine Islands as adjudges recovery by the respondent from your petitioner, may be reversed by this court, and this cause remanded with the directions proper in the premises;

(c) That the stay of the execution of the judgment herein be continued pending the hearing and determination of this application, and if the application be granted, then also pending the final determination by the court on review;

(d) That your petitioner may have such other and further relief or remedy as to this court may seem just.

CHARLES MARVIN,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I have carefully examined the foregoing petition, and, in my opinion, the same is well founded and the case is one in which the prayer of the petitioner should be granted by this court.

CHARLES MARVIN,

Attorney for Petitioner.

Washington, September 15, 1920.

NOTICE OF SUBMISSION, ETC.

To SMITH, BELL & COMPANY, Respondent:

You will please take notice that a petition, of which the foregoing is a copy, together with a copy of the record in this case in the Supreme Court of the Philippine Islands, (bearing No. 14466 on the docket of that court) duly certified by the clerk thereof, was filed with the Clerk of the Supreme Court of the United States on September 15, 1920, and that the petition will be submitted on October 18, 1920, at the opening of the court on that day at 12 o'clock noon, or as soon thereafter as counsel can be heard.

CHARLES MARVIN,
Attorney for Petitioner.

Washington, D. C.
October 2, 1920.

ADMISSION OF SERVICE.

Due service of printed copies of the foregoing petition and of the record in the Supreme Court of the Philippine Islands, and of the above notice, on this day of October, 1920, is hereby admitted.

_____

Attorney for Smith, Bell & Company, Limited, Respondent.

In the Supreme Court of the United States

OCTOBER TERM, 1920

No. 544.

JAMES J. RAFFERTY, AS COLLECTOR OF INTERNAL REVENUE FOR THE PHILIPPINE ISLANDS, PETITIONER,

vs.

SMITH, BELL & COMPANY, LIMITED, RESPONDENT

No. 548.

JAMES J. RAFFERTY, AS COLLECTOR OF INTERNAL REVENUE FOR THE PHILIPPINE ISLANDS, PETITIONER,

vs.

COMPANIA GENERAL DE TABACOS DE FILIPINAS, RESPONDENT

No. 553.

JAMES J. RAFFERTY, AS COLLECTOR OF INTERNAL REVENUE FOR THE PHILIPPINE ISLANDS, PETITIONER,

vs.

VISAYAN REFINING COMPANY, RESPONDENT

BRIEF FOR RESPONDENTS OPPOSING APPLICATIONS FOR WRITS OF CERTIORARI

I
NO ERRORS ASSIGNED OR ARGUED

At the outset, attention is directed to the fact that no error in law in the Court proceedings up to, and including, final judgment in the Supreme Court of the Philippine Islands is alleged in any of these cases. Not only is no error in law alleged or pointed out, but none is even suggested. In fact, it is admitted that no error exists in any of the proceedings connected with these cases up to, and including, final judgment. A writ of certiorari is designed for the purpose of review by the Appellate Court of law errors only. As no errors of law have been assigned and none exist in the Court below, these writs should be immediately denied.

II
THE ALLEGED RATIFICATION IS UNCONSTITUTIONAL

No error in the prior proceedings having been alleged and none being relied upon, petitioner's whole case rests upon the alleged ratification by the Act of Congress of June 5, 1920. The judgment in each of these cases was a final judgment ordered by the Supreme Court of the Philippine Islands. It was for taxes illegally collected between October 1, 1916, and September 30, 1917. That of respondent, Smith, Bell & Company, was rendered on March 15, 1920; that of respondent, Compania General De Tabacos De Filipinas, was rendered on March 16, 1920, by said Court; and that of respondent, Visayan Refining Company, was rendered by said Court on March 18, 1920. These judgments were absolutely final. Petitioner's contention is that each of these judgments was de-

stroyed and nullified by the Act of Congress several months later, or on June 5, 1920. At the outset, respondents deny that Congress ever intended to ratify, or ever did ratify, by said Act or any other Act, the taxes for which judgments herein have been rendered. Respondents contend that the said Act of Congress of June 5, 1920, dealt with an entirely different class of taxes. But assuming that the said Act was intended by Congress to ratify the taxes herein in dispute, respondents further contend that any such ratification to the extent of annulling the judgments herein and destroying them would be, and is, beyond the powers of Congress, unconstitutional and absolutely void.

For convenient reference, we quote said Act of Congress of June 5, 1920:

> "The taxes imposed by the Philippine Legislature in section 1614 of Act No. 2657, enacted by that body February 24, 1916, are legalized and ratified, and the collection of all such taxes made under or by authority of such Act of the Philippine Legislature is legalized, ratified, and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress, been specifically authorized and directed."

From a misunderstanding of the "Insular Cases" and certain subsequent decisions of this Court, it has been asserted that Congress has power unlimited to legislate for the Insular Possessions; that none of the safeguards and limitations of the Constitution of the United States protect lives, liberties and property in the Possessions against Congressional action. This belief has no foundation in the decisions of this Court and none in principle.

If there is no decision of this Court affirmatively applying any guaranty or limitation of the Constitution in the Philippine Islands or Porto Rico, the reason is plain: The occasion has not arisen. No case has been presented in this Court wherein Congress, legislating for the Possessions, has attempted to pass a Bill of Attainder, to grant a Title of Nobility, to prohibit the free exercise of religion, nor, without due process of law, to deprive any person of life, liberty or property.

In cases wherein insular legislatures have encroached upon personal rights, the decisions have been based upon the guaranties of Congressional organic laws, and the Court has avoided as unnecessary determining whether the corresponding provisions of the Constitution would have been applicable. Thus in Kepner *v.* United States, 195 U. S. 100, Justice Day says (p. 124): "It is not necessary to determine in this case whether the jeopardy provision in the Bill of Rights would have become part of the law of the Islands without Congressional legislation."

On the other hand, the power of Congress over the Insular Possessions is derived from the same provision of the Constitution—Art. IV, sec. 3, par. 2—which supported the jurisdiction of Congress in the Territories which later became States. And it has been held, as we shall see, that in legislating for those Territories Congress was not wholly exempt from constitutional limitations.

It has been held that the Uniformity Clause of Art. 1, sec. 8, does not apply to duties imposed by Congress in the Possessions, because the section requires uniformity only "throughout the United States," and the

Possessions are not a part of the United States. Downes *v.* Bidwell, 182 U. S. 224. But in that case even the majority of the Court conceded that the Constitution contains limitations which operate upon the power of Congress wherever exercised; and it is apparent that the decision would have gone the other way if the requirement of uniformity had been stated in the Constitution without the qualifying phrase.

It has been held, also, that the right to trial by jury conferred by the sixth amendment does not extend to the Territories and Possessions. Hawaii *v.* Mankichi, 190 U. S. 197; Dorr *v.* United States, 195 U. S. 138. But in the Mankichi case Justice Brown says for the Court (p. 217): "We would even go farther, and say that most, if not all, the privileges and immunities contained in the Bill of Rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case (indictment by grand jury and trial by jury) are not fundamental in their nature but concern merely a method of procedure. . . . " And Justices White and McKenna, concurring, point out that Hawaiian laws must yield, "where they were inconsistent with those fundamental provisions of the Constitution which were, by their own force, applicable to the territory with which Congress was dealing."

In the Dorr case, Justice Day says:

> "The exercise of the power expressly granted to govern the territories is not without limitations. Speaking of this power, Mr. Justice Curtis, in the case of Scott *v.* Sanford, 19 How. 614, 15 L. ed. 787, said:

"'If, then, this clause does contain a power to legislate respecting the territory, what are the limits of that power?

"'To this I answer that in common with all the other legislative powers of Congress, it finds limits in the express prohibition on Congress not to do certain things; that in the exercise of the legislative power, Congress cannot pass an *ex post facto* law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution'" (p. 142).

* * * * * * *

"The limitations of this power were suggested by Mr. Justice Curtis in the Scott Case, above quoted, and Mr. Justice Bradley in the Church of Jesus Christ of L. D. S. *v.* United States, 136 U. S. 1, 34 L. ed. 481, 10 Sup. St. Rep. 792, said:

"'Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its privisions'" (p. 146).

In Downes *v.* Bidwell, 182 U. S. 262, Justice Brown says, for the majority of the Court:

"To sustain the judgment in the case under consideration, it by no means becomes necessary to show that none of the articles of the Constitution apply to the Island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such are operative only 'throughout the United States' or among the several states.

"Thus when the Constitution declares that 'no bill of attainder or *ex post facto* law shall be passed,' and that 'no title of nobility shall be granted by the United States,' it goes to the competency of Congress to pass a bill *of that description.* Perhaps the same remark may apply to the 1st amendment, that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble and to petition the government for a redress of grievances.' We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local application." (p. 276.)

* * * * * * *

"We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government . . . .'" (p. 282.)

In the same case Mr. Justice White, for himself, Mr. Justice Shiras and Mr. Justice McKenna, concurring, says:

> "While, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for any and all of the territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended." (p. 290.)
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> * * * * * * *
>
> "Undoubtedly there are general prohibitions in the Constitution in favor of the liberty and property of the citizen, which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts." (p. 294.)

The grounds of dissent in the Insular cases show that all of the Justices were agreed that the "general prohibitions," in support of "natural rights" limited the power of Congress to legislate for the Possessions.

Among these effective limitations is certainly that of the Fifth Amendment:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law."

In Fletcher *v.* Peck, 6 Cranch 87, the State of Georgia had authorized by statute the sale of state lands. After conveyance had been made by virtue of this statute the State Legislature by another statute undertook to annul and rescind the first law and to

avoid the title acquired by its authority. The case involved the prohibition of Art. 1, sec. 10, whereby the States are forbidden to impair the obligation of contracts. But the opinion of Chief Justice Marshall is of especial interest for our present inquiry.

> "Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held? (p. 135).
>
> "The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.
>
> "The correctness of this principle, so far as respects general legislation, can never be controverted. But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power.
>
> "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?
>
> "To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection.
>
> * * * * * * *
>
> "The validity of this rescinding act, then, might well be doubted were Georgia a single sovereign power. . . . (p. 136).
>
> * * * * * * *
>
> "The state legislature can pass no *ex post*

> *facto* law. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law annulling the title by which he holds that estate? The Court can perceive no sufficient grounds for making this distinction. . . . " (p. 138).

In the same case Mr. Justice Johnson, concurring, denies the application of Art. I, sec. 10, and puts his assent squarely on the ground of general principles.

> "I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things; a principle which will impose laws even on the Diety" (p. 143).

Authorities might be multiplied, but there will hardly be dissent from the principle. The confiscation of private property by legislation, "without due process of law," is so abhorrent to the whole spirit of the Constitution that if, as the *Insular Cases* so strongly suggest, there are limitations which Congress may not disregard in legislating for the territories, the "due process clause" is one of them. Indeed, it

is so specified by Justice Brown in Downe *v.* Bidwell, *supra*,—"the right to . . . individual property . . . to due process of law."

ALLEGED RATIFICATION IS PROHIBTED BY FIFTH AMENDMENT, U. S. CONSTITUTION

The alleged ratification attempts to destroy plaintiff's judgment, which is property. That there is neither compensation nor due process of law is obvious. That the judgment is property, within the meaning of the Fifth Amendment, is supported by uncontroverted authority.

> "A vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away." Cooley, Contitutional Limitations, p. 443.
>
> Approved in Pritchard *v.* Morton, 106 U. S. 124; Baltimore, etc., *v.* Reed, 158 Ind. 26, 56 L. R. A. 468; 6 R. C. L. 316.
>
> "A judgment is such a vested right of property that the legislature cannot, by a retroactive law, either destroy or diminish its value in any respect." 6 R. C. L. 319; Merchants Bank *v.* Ballou, 98 Va. 112, 44 L. R. A. 306; Strafford *v.* Sharon, 61 Vt. 126, 4 L. R. A. 499.
>
> "It has been determined by this court and numerous other courts that no one can be deprived of a vested right of action without infringing on that provision of our Constitution and that of the United States respecting the deprivation of life, liberty and property without due process of law." *In re* Flukes, 157 Mo. 125, 51 L. R. A. 176.

See also Lamb *v.* Powder River Co., 132 Fed. 439.

In the case of Choate *v.* Trapp, 224 U. S. 665, it appears that Congress by the Curtis Act of 1898, amended in 1902, provided for the allotment of tribal lands of Indians and for exemption of the individual holdings from taxation. In 1908 an Act of Congress authorized taxation of the same lands. The State of Oklahoma attempted to impose taxes and the Indians resisted. The Supreme Court, by Mr. Justice Lamar, says (p. 673):

> "The patent issued in pursuance of those statutes gave the Indian as good a title to the exemption as it did to the land itself. Under the provisions of the 5th Amendment there was no more power to deprive him of the exemption than of any other right in the property."

A very recent case, involving the same facts is Wood *v.* Love County, decided April 26, 1920, U. S. Adv. Ops. 1919-20, p. 492. This case follows Choate *v.* Trapp, but is interesting to us in that the suit was brought by the Indian to recover a tax paid under protest, which the County sought to retain under the supposed authority of an Act of Congress rescinding an exemption. If Oklahoma were still a territory the analogies would be complete. The Court says:

> "As these claimants have not disposed of their allotments and twenty-one years have not elapsed since the date of the patents, it is certain that the lands were non-taxable. This was settled in Choate *v.* Trapp, *supra,* and the cases decided with it; and it was also settled in those cases that *the exemption was a vested*

> *property right arising out of a law of Congress* and protected by the Constitution of the United States." (Italics ours.)

Whether a final judgment is in the nature of a contract or not, there can be no question but that it is a right of property which the Legislature cannot take away. A person, in whose favor such a judgment is entered, has a property right and he cannot be divested of the same without due process of law or just compensation.

> "A judgment is such a vested right of property that the Legislature cannot, by retroactive law, either destroy or diminish its value in any respect." 6 R. C. L. 319. Also see authorities in footnote.

UNITED STATES v. HIENSZEN DINTINGUISHED

A group of cases arose from the imposition, on goods imported into the Philippine Islands from the United States, of duties prescribed by the military tariff of 1898. In Lincoln *v.* United States (and Warner Barnes & Co. *v.* United States), 197 U. S. 419, it was held that after the ratification of the Treaty of Paris the military tariff lapsed for lack of authority in the President to maintain it; also that the attempted ratification of the President's action in section 2 of the Act of July 1, 1902 (the Philippines Bill), was ineffective.

Congress thereupon enacted a ratification of the tariff duties collected during the period in question, using the same formula that appears in the ratification of June 5, 1920. A suit for recovery of the protested duties, pending in the Court of Claims at the time of the ratification, was then pressed; this Court

in United States *v.* Heinszen, 206 U. S. 370, held that the ratification had cured the invalidity of the collection of duties, and denied the claim.

The Heinszen Case upholds, *under the facts of that case*, the power of Congress to ratify the collection of taxes imposed by the President without prior authority; it further holds that such ratification may divest a right of action *not reduced to judgment*. But the reasoning of the Heinszen opinion compels the opposite conclusion as to the validity and effect of the ratification of 1920 as applied in this case.

1. The military tariff of 1898 was superseded by a Philippine tariff act approved by Congress in the Act of March 8, 1902. The ratification of the military tariff applied, by its terms, to "the tariff duties—imposed—prior to March 8, 1902." The duties involved in the Heinszen case were collected after the Treaty of Paris and before March 8, 1902. It was not suggested, and could not have been contended, that the ratification of the military tariff could have validated any collections made ostensibly under its authority after its repeal.

In the present case the judgment covers export duties collected under the pretended authority of sec. 1614 of Act 2657 and after August 29, 1916, when so much of said section as authorized export duties was repealed by sec. 11 of the Jones Law. If there were involved herein any export duties collected under sec. 1614 before the repeal these would be covered by the terms of the ratification of 1920, which certainly can apply to the provisions ratified only so long as they remained in existence. (See, *infra*, the analysis of the terms of the ratification.)

The distinction is made by Justice White in the Heinszen Case (p. 285):

> "The proposition begs the question for decision, by shutting out from view the potential fact that when the goods were brought into the Philippine Islands there was a tariff in existence under which duties were exacted in the name of the United States."

In this case it may be said that when the goods were exported from the Philippine Islands the provision for export duties of sec. 1614 of Act 2657 was *not in existence*, having been repealed by sec. 11 of the Jones Law.

2. While the Heinszen case holds that a Congressional ratification may destroy a mere right of action, practically overruling in this respect De Lima *v.* Bidwell, 182 U. S. 1, yet the reasoning, by distinction, compels the conclusion that a claim reduced to judgment is immune. In the following quotations from the Heinszen opinion the italics are ours.

> "Nor does the mere fact that, at the time the ratifying statute was enacted, this action *was pending* for the recovery of the sums paid, cause the statute to be repugnant to the Constitution. The *mere commencement* of the suit did not change the nature of the right. . . .
>
> "Considering how far the bringing of actions would operate to deprive government of the power to enact curative statutes, which, if the actions had not been brought, would have been unquestionably valid, Cooley, in his Constitutional Limitations, says (7th ed. p. 543):
>
> "'Nor is it important, in any of the cases to which we have referred, that the legislative act which cures the irregularity, defect, or

> want of original authority, was passed after suit brought, in which such irregularity or defect became matter of importance. The bringing of suit vests in a party no right to a particular decision (cases cited); and his case must be determined on the law as it stands, not when the suit was brought, but *when the judgment is rendered.* (Cases cited)'" (p. 378).

In this case judgment was rendered before the ratification, and the right of plaintiff thus became vested and beyond the reach of the curative statute. That an appeal was taken from the judgment is, of course, immaterial. Under Philippine procedure, appeal from the judgment of a court of first instance does not vacate the judgment, and may not even suspend its execution.

3. In the Heinszen case the suit was against the United States. Mr. Justice Harlan, concurring, says (p. 391):

> "Interpreted in the light of previous and pending litigation, this act should be construed as denying the authority of any court to take cognizance of a suit brought against the United States to recover any claim arising out of such collections. The act should, therefore, be construed as withdrawing the consent of the United States to be sued on account of claims of that character. In this view, it was error to render judgment against the United States, whatever might be the liability of the collector, if his exaction of the duties in question was without authority of law. Upon this ground alone, and without considering any of the questions discussed in the opinion of the court, I concur in the judgment of reversal."

In these cases the suits are against James J. Rafferty and they involve only the "liability of the collector." The distinction is clear between an Act of Congress denying the liability of the United States and an Act which pretends to relieve one individual from his judgment debt to another.

III
CONGRESS NEVER ATTEMPTED TO RATIFY TAXES AT ISSUE

The argument thus far presented proceeds on the theory that by the Act of June 5, 1920, Congress really intended to ratify the illegal collection of taxes here in dispute, namely, those between September 30, 1916, and October 1, 1917. The Administrative Code of 1916, approved February 24, 1916, effective July 1, 1916, contains Section 1614 which was the subject of the Congressional Act of June 5, 1920. It is now proposed to demonstrate conclusively that Congress never intended by this Act of June 5, 1920, to ratify any of the taxes here in dispute, namely, any of those collected between September 30, 1916, and October 1, 1917, but did intend to ratify those taxes collected under authority of the same section of the Administrative Code of 1916, between July 1, 1916, the date the Code became effective, and August 29, 1916, the date the Jones Law became effective. Section 1614 of the said Administrative Code of 1916 imposed a tax on export sales and consignments and to that extent imposed export duties. On August 29, 1916, Congress enacted the Jones Law, Section 11 thereof providing "that no export duties shall be levied or collected on exports from the Philippine Islands." Congress had paramount power in the premises and

therefore the Jones Law repealed so much of the Administrative Code of 1916 as imposed export duties, for as Chief Justice Marshall says, in McCulloch *v.* Maryland, 4 Wheat. 316, 425:

> "A law absolutely repugnant to another as entirely repeals that other as if express terms of repeal were used."

A TAX ON EXPORTS FROM THE PHILIPPINE ISLANDS IS A REGULATION OF COMMERCE, AND EXCLUSIVELY WITHIN THE JURISDICTION OF THE CONGRESS OF THE UNITED STATES, UNLESS CONGRESS SPECIFICALLY GRANTS AUTHORITY IN THE PREMISES TO THE PHILIPPINE LEGISLATURE.

In reply to petitioner's contention (p. 22, sec. 111c) that the Philippines could impose export taxes without specific authority from Congress, it is sufficient to say that the Philippine Government derives all of its power from Congress. The Philippine Government has no inherent power to legislate. The first real Philippine legislation conferring authority upon the Philippine Islands to legislate was the Act of Congress of July 1, 1902, and in that act no authority was granted the Philippine Islands to impose export taxes. That it was well understood by both the Philippine government and by Congress that no such power to levy export taxes was granted is made manifest when we look to the Act of Congress of July 1, 1916, which ratified and confirmed the Act of the Philippine Legislature of December 21, 1915, as amended by the Act of February 4, 1916.

It is to be noted that at no time did Congress ever

confer upon the Philippine legislature general capacity to levy such an export tax. On the contrary, the only general law Congress passed was a specific prohibition against the levying of such an export tax, which prohibition is Section 11 of the Jones Law of August 29, 1916. The various ratifications that have occurred, as set forth by petitioner, have been confined exclusively to validating a special tax that had been imposed for a specific period of time. In Crew-Levick against Pennsylvania (245 U. S. 292; 256 Pa. St. 508) this Court held that a tax imposed upon the business of selling goods in foreign commerce is an attempt to regulate foreign commerce and is also an imposition upon such exports, using the following language:

> "The bare question, then, is whether a state tax imposed upon the business of selling goods in foreign commerce, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries, is in effect a regulation of foreign commerce *or an impost upon exports*, within the meaning of the pertinent clauses of the Federal Constitution. Although dual in form, the question may be treated as a single one, since it is obvious that, for the purpose of this case, an *impost upon exports* and a regulation of foreign commerce may be regarded as interchangeable terms. And there is no suggestion that the tax is limited to the necessities of inspection, or that the consent of Congress has been given. We are constrained to hold that the answer must be in the affirmative."

The doctrine announced in that decision is in conformity not only with the commerce clause of the Constitution of the United States (Par. 2, Sec. 10,

Art. 1, Const. of the U. S.) but with many other decisions of this court of the United States.

Patapsco Guano Co. *v.* North Carolina Board of Agriculture, 171, U. S. 345, 350;
Brown *v.* Maryland, 12 Wheat. 419;
Nathan *v.* Louisiana, 9 How. (U. S.), 75;
Cock *v.* Pennsylvania, 97 U. S. 566;
Pittsburgh, etc., Co. *v.* Louisiana, 156 U. S. 590;
Trade-Mark Cases, 100 U. S. 82;
Almy *v.* California, 12 How. 169;
McCulloch *v.* Maryland, 4 Wheat. 316.

The right to regulate interstate commerce is expressly reserved to the Congress of the United States by the Constitution. The Congress exercised the right reserved to it by Sec. 11 of the Jones Law.

More clearly to understand just what was done by the Act of Congress of June 5, 1920, consider historically the entire subject. The Philippine legislature by an Act of December 21, 1915, effective January 1, 1916, imposed the first tax on exports out of the Philippines. At that time there had been no congressional authority given the Philippine legislature to impose such an export tax. On February 4, 1916, the previous law was changed so as to impose the tax on consignments abroad as well as sales, and there was still no congressional authority for the imposition of the tax. The Philippine legislature by Act of February 24, 1916, known as the Administrative Code and which superseded prior legislation, effective July 1, 1916, imposed a tax on exports. On July 1, 1916, by a rider on an appropriation bill the

Congress of the United States passed an act ratifying the export tax imposed by the Philippine legislature by the two Acts referred to, one of December 21, 1915, and the other of February 4, 1916, both effective January 1, 1916. It is to be noted that this act of Congress of July 1, 1916, did not ratify the tax imposed by the Administrative Code, known as the Act of February 24, 1916, effective July 1, 1916. It simply ratified the tax that had been imposed by the two proceding Acts, which of themselves died when the Administrative Code that superseded them went into effect July 1, 1916, died the very day the ratifying Act of Congress was passed. On August 29, 1916, Congress passed the famous Jones Law in the nature of a constitution for the Philippine Islands and in which the powers of the Philippine legislature were clearly set forth. This law had engaged the attention of Congress for a period of three years. Its provisions were matured with the utmost care. It was the most deliberate expression Congress has ever given in respect to local government in the Philippine Islands. One of the provisions that was the subject of much discussion, and one that was overwhelmingly adopted by Congress was that of Section 11, the pertinent part of which is as follows:

> "No export duty shall be levied or collected on exports from the Philippine Islands."

The Philippine Act of December 21, 1915, and the Philippine Act of February 4, 1916—both effective January 1, 1916—died July 1, 1916, in that they were superseded when the Philippine Administrative Code of 1916, passed on February 24, 1916, went into effect.

Therefore, when the Act of Congress of July 1, 1916, ratified the taxes which these two Philippine Acts had illegally imposed, its authority extended only down to July 1, 1916, the very day it was enacted, which was the day the two Acts went out of existence.

The export tax provision of the Code of 1916, being section 1614, which had been passed by the Philippine legislature without due authority of Congress died the minute Congress passed the Jones Law, August 29, 1916. If any authority for such an export tax existed anywhere by reason of an Act of the Philippine legislature prior to August 29, 1916, on that day it ceased to exist.

On March 10, 1917, the Philippine legislature passed the Philippine Administrative Code of that year, which became effective October 1, 1917. This Act of 1917 pretended to impose an export tax, notwithstanding the specific prohibition contained in the Jones Law above set forth. The following year, on June 4, 1918, by a rider on an appropriation bill, Congress ratified the export tax imposed by this Act of 1917, but confined its ratification exclusively to this particular export tax imposed in 1917.

In the effort to ascertain the intent of Congress in these various ratifications, it will help to pause a moment and contemplate the facts that were before Congress on June 4, 1918, when it passed this Act. The Jones Law of August 29, 1916, specifically prohibited an export tax. Nevertheless, the Collector of Internal Revenue of the Philippines, petitioner herein, had been collecting such tax and in open defiance of the Act of Congress. After the enactment of the Jones Law he collected the export taxes that are here in dis-

pute. He had also been collecting export taxes alleged to be imposed by the Administrative Code Act of 1917.

With both sets of facts before it, Congress did not ratify any export tax petitioner collected after the Jones Law was passed and prior to the taking effect of the Administrative Code of 1917. That is, Congress ratified no export tax that had been illegally imposed prior to October 1, 1917. Congress did ratify the export tax petitioner had collected subsequent to October 1, 1917. Therefore, Congress, having before it both sets of export taxes, both illegally collected, refused to ratify the one and did ratify the other. We must infer the intent of Congress, therefore, to be that it declined to go back beyond the Administrative Code of 1917 and deliberately declined to ratify the export tax that had been collected by petitioner prior to the taking effect of said Code of 1917.

At the time Congress passed the Act of June 4, 1918, respondents had begun their suits to recover the taxes at issue here. It would be only reasonable that Congress should decline to interfere with the respondetns' rights, as they were then in process of litigation.

On June 5, 1920, two years later, Congress passed another ratifying act in the following language.

> "The taxes imposed by the Philippine legislature in section 1614 of the Act numbered 2657, enacted by that body on February 24, 1916, are legalized and ratified, and the collection of all such taxes made under or by authority of such Act of the Philippine legislature is legalized, ratified, and confirmed as fully to all intents and purposes as if the same

had by prior Act of Congress been specifically authorized and directed" (41 Stat. 1015, 1025).

The question now is, Over what period of tax collection did Congress by this act intend to ratify or attempt to ratify? *It is contended by respondents that it is beyond all question that Congress intended to ratify only those export taxes collected by petitioner between July* 1, 1916, *and August* 29, 1916. It is to be especially noted that at no other time did Congress ratify the export taxes collected during this period. By the terms of the Act of Congress of July 1, 1916, the export taxes are ratified that were authorized by the Philippine Act of December 21, 1915, effective January 1, 1916, and the modification of the same by the Philippine Act of February 4, 1916. Congress did not then ratify any of the export taxes imposed by the Administrative Code of 1916 passed February 24, 1916, effective July 1, 1916. It appears clear that Congress, looking back, noted it had not ratified the export taxes during that period which had existed prior to the passage of the Jones Law, therefore by this Act of June 5, 1920, did ratify them.

Every consideration supports this contention. In no other way can these various Acts of Congress be construed in harmony with each other. Congress cannot always be presumed to do the wisest thing in the world, but it certainly can never be presumed to do a foolish thing. On June 4, 1918, Congress ratified such of the export taxes as had been collected after the passage of the Jones Law as it desired to ratify. It would be ridiculous for Congress, two years later, to take up the job again and ratify export taxes that had

been collected four years before and two years before the passage of the preceding act. Many months prior respondents had secured the final judgments in the highest court of the Philippines. Surely it could hardly be assumed that Congress would deliberately intend to confiscate respondents' property and nullify these judgments. It would neither be good morals nor good government. It would be about the worst sort of government anybody could conceive of. Furthermore a ratifying act of this character must be construed strictly. Its very language limits its application to the period between July 1, 1016, and August 29, 1916. It says:

> "Taxes imposed by the Philippine legislature in Section 1614 of the Act numbered 2657 . . . are . . . legalized, ratified, and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

It does not presume to give that act of the Philippine legislature any more authority than the Philippine legislature had given it—in fact, exactly the same. The Philippine legislature had not been able to give by that act any authority beyond the passage of the Jones Law of August 29, 1916. When the Administrative Code of February 24, 1916, the one in question, was passed, no authority of Congress existed for the imposition of such export tax by the Philippine legislature. It became effective July 1, 1916. This Act of Congress of June 5, 1920, thereby gave this Philippine Act life and vitality it might have had when enacted, provided Congress theretofore had authorized the imposition of such an export tax. Sup-

posing Congress had theretofore empowered the Philippine legislature to impose such an export tax and thereafter the legislature had passed the Act it did pass February 24, 1916, the one in question, then the export tax would have died August 29, 1916, when the Jones Law became effective. This subsequent ratification of Congress must be construed only in the nature of legalizing that which the Philippine legislature had undertaken to do illegally, but nothing more. As the pertinent section of the Philippine Code of 1916 died August 29, 1916, so this ratification of June 5, 1920, can be presumed only to affect that period down to the said August 29, 1916. There is nothing in this ratification of June 5, 1920, that can even by implication be construed as a repeal of the great fundamental Jones Law. It is one thing to ratify some tax imposed illegally by a law of the Philippine legislature and quite another thing to repeal the Jones Law which had become the fundamental law of the Philippine Islands. It certainly is a violent assumption to say that by a rider on an appropriation bill, and one that was passed in the very last moments of a congested legislative session, Congress intended to repeal the Jones Law, which is the fundamental law even in the nature of a constitution for the Philippine Islands.

Let us view the subject from a slightly different line of argument.

June 5, 1920, Congress ratified the taxes imposed in section 1614 of the Administrative Code of 1916 and the collections made by its authority. It is clear that, while the ratification may have remedied the lack of authority for the export duties, it did not

prolong their life. The curative act does not pretend to impose taxes itself, but merely to validate taxes imposed by section 1614, and its saving grace lapsed with the provisions to which it attached. The ratification of collections extends only to those "made under or by authority of" Act No. 2657, and no export duties collected after the appropriate provisions of the Act were repealed by the Jones Law were made under, or by authority of, such provisions.

Suppose that the Philippine Legislature on August 29, 1916, had amended Act No. 2657 by striking from section 1614 the provision for export duties. Manifestly the imposition and collection of such export duties thereafter would have been wholly arbitrary, unjustified by the law, and would not be cured by the ratification. Is the case any different because the repeal was effected by Congress?

It will hardly be contended that ratification is *more effective* than prior authorization. In United States *v.* Heinszen, 206 U. S. 370, at page 384, Mr. Justice White adopts the statement from Mattingly *v.* District, 97 U. S. 687, 690:

> "The ratification, if made, was equivalent to an original authority, according to the maxim, *Omnis retihabito retrotrahitur et mandato priori acquiparatur.*"

And, in the ratification of June 5, 1920, Congress fixes the effect to be given to its action "as fully to all intents and purposes as if the same had, by prior Act of Congress, been specifically authorized and directed."

Let us apply the test prescribed by Congress. Suppose that, instead of ratification, there had been spe-

cific prior authorization and direction from Congress to the Philippine Legislature to impose export duties. Then the export duties under section 1614 of Act No. 2657 were perfectly valid from July 1, 1916, to August 29, 1916, after which date they were perfectly invalid because section 11 of the Jones Law not only withdrew the supposed prior authority, but positively forbade that form of taxation.

That the repeal preceded the ratification is immaterial. The two acts are not mutually repugnant; both can stand together; and, of course, if more than one construction is possible, that must be preferred that will enable them to stand together. The situation is no different from that which would have arisen if ratification and repeal had been effected by two sections of the same Act. Suppose that the Jones Law had provided in one paragraph for the ratification of section 1614 of Act No. 2657, and in another that no export duties should be levied or collected. The result would have been to validate the export duties to August 29, 1916, and to prohibit them from that date.

The ratification of June 5, 1920, does not repeal the prohibition of section 11 of the Jones Law, and, *a fortiori*, does not annul that prohibition restrospectively. If Act No. 2657 were of later date than the Jones Law, and section 1614 required curative action only in respect to export duties, there might be a contrary inference, because in such a case the ratification could have no application except in derogation of the prohibition and would repeal the latter to the extent of their repugnance, in accordance with the principle declared by Chief Justice Marshall in Mc-

Culloch *v.* Maryland (quoted *supra*). But the ratification has room for application to export duties under sec. 1614 before the date of the Jones Law; it has room for application, too, in respect to the taxes on sales of imports in original packages (import duties) which are not expressly forbidden by Congress, but were beyond the powers of the legislature. So the ratification and the prohibition not only are not repugnant, but they fit into each other perfectly.

> "Repeals by implication are not favored. This means that it is the duty of the Court to so construe the acts, if possible, that both shall be operative." Lewis' Sutherland, Statutory Construction, sec. 247.
>
> "The intention to repeal . . . will not be presumed, nor the effect of repeal admitted, unless the inconsistency is unavoidable, and only to the extent of the repugnance." *Id., id.*
>
> See, also, 25 R. C. L. 916, secs. 169, 170.

The judgment herein covers only collections made after October 1, 1916, and, therefore, after the repeal by the Jones Law of the export duty provisions of Act No. 2657. The ratification has no application herein.

IV

RULES OF CONSTRUCTION

We have already adverted to the principle that sec. 11 of the Jones Law and the ratification of June 5, 1920, must, if possible, be reconciled. The only way to avoid such reconciliation is so to interpret the ratification as to repeal *pro tanto*, and retrospectively, the Jones Law prohibition.

> "It is a well settled rule that laws are not to

be construed retrospectively, or to have a retrospective effect, unless it shall clearly appear that it was so intended by the enacting body, and unless such construction is absolutely necessary to give meaning to the language used." Lewis' Sutherland, op. cit., sec. 641.

Although in the Heinszen Case, *supra*, this Court holds that Congress has *power* to divest by ratification rights of action not reduced to judgment, the Court emphasizes the principle that doubts must be resolved in favor of such a construction as would save pending actions, and approves statements to the same effect in the De Lima Case and the Lincoln Case. Thus, citing the Lincoln Case, it is said (206 U. S. at p. 390):

> "In the course of the opinion, in answering the argument that the alleged ratifying statute would be meaningless unless it were held applicable to the particular duties in controversy, it was pointed out (202 U. S. p. 499) that there were duties levied and collected other than those in controversy, to which the act clearly applied, and 'that question (as to them) was put at rest by this ratification.' Further in calling attention to the ambiguity in the ratifying statute relied upon and the resulting doubt whether it embraced all duties, it was pointed out that the fact that actions were pending at the time of the ratifying act lent cogency to the view that, if Congress had intended by the ratification to affect them, it would have explicitly so declared. On this subject the Court said (p. 498):
>
> " 'This construction is favored by the consideration that the suits had been begun when

the Act of July 1, 1902, was passed, and that, even if Congress could deprive plaintiffs of their vested rights in process of being asserted (Hamilton *v.* Dillin, 2 Wall, 73), still it is not to be presumed to do so on language which, literally taken had a narrower sense.'"

If, as is said, there is a presumption against the intention of Congress to divest mere rights of action in process of being asserted, the presumption is stronger that Congress does not purpose to avoid such rights when reduced to judgment.

There is another potent principle that works against such a construction as would destroy vested rights. This is the presumption that statutes are not intended to work injustice. 25 R. C. L. 1022. To impose in 1920 a percentage tax on gross proceeds of exports of 1916 —and such would be the practical effect of the appellant's theory of the ratification—would be a hardship without precedent. For Congress to declare in 1916 that no export duties shall be imposed, to leave that declaration in full force until June, 1918, and then in 1920 to ratify collections made in 1916-17 in open defiance of its own prohibition, would be grossly unjust. Exporters were entitled to rely upon section 11 of the Jones Law so long as it stood unrepealed, to adjust their business accordingly, and to consider the sums paid under protest to lawless collectors as assets surely realizable by aid of the independent courts of a democracy. For Congress in 1920, after the protesting exporters had acted upon the assurance of Congress, and had borne the burden of litigation to enforce their plain rights, to revoke the assurance would be nothing less than bad faith.

"A state statute or an act of Congress will,

if possible, be construed so as not to convict the state or the United States of a breach of good faith." (Cases cited.) 25 R. C. L. 1029.

V.

TAXES INVOLVED ARE CLEARLY EXPORT TAXES

On Page 15, Section III-A, petitioner presents a rather novel argument stating that the export taxes in question are not exports, assuming that commodities shipped out of the Philippine Islands are to be termed "exports" only in case they are sent to countries other than the United States. Goods shipped out of the Philippines into the United States have always been considered exports by the Governments of the Philippines and the United States. The tariff laws of the United States for twenty years have so described commodities shipped from the Philippines into the United States. The decisions of the court in both jurisdictions are uniform in this regard. It certainly requires a stretch of the imagination beyond the capacity of the writer to picture commodities shipped from the Philippines into the United States as domestic sales.

VI.

CODIFICATION THEORY ABSURD

On Page 19, Section III-B, petitioner contends that the various acts of the Philippine legislature can and should be construed as codifications of the one law, not as separate, distinct acts. Several things make it absolutely impossible so to consider these acts. The first and most important obstacle is that the two vital acts, namely, that of the Philippine legislature, ap-

proved December 21, 1915, effective January 1 ,1916, as modified by Act of February 4, 1916, effective January 1, 1916, and the Act approved February 24, 1916, effective July 1, 1916, known as the Administrative Code of 1916, were both destroyed completely as to this tax provision by the Act of Congress familiarly called the Jones Law, of August 29, 1916. If Congress had the power to forbid such export taxes, any law theretofore passed by the Philippine legislature, imposing such a tax was immediately rendered null and void. The Philippine Act of 1917, subsequently passed, can hardly be said to have codified statutes which were dead and buried. Another obstacle that cannot be overcome is that the successive acts of the Philippine legislature referred to by petitioners differ one from the other in so many particulars and often essential particulars that they cannot be construed as successive codification of existing law. Reference to the acts as set forth in petitioner's brief immediately discloses the differences alluded to. The export tax was first only on domestic sales; later it was extended to sales abroad; then it was extended to consignments abroad.

These successive Acts of the Philippine legislature, having made these marked changes, cannot be said to be codifications of one existing law. They continually changed the law.

VII

INTEREST AND COSTS WERE PROPERLY ALLOWED

The Supreme Court of the Philippine Islands allowed interest to respondents at the legal rate of 6 per cent, covering certain periods specified in the

Court's opinion. This allowance of interest was in harmony with the Philippine code in effect which provides that interest shall be payable from date of demand. The question of allowing interest in a case of this kind has very recently been exhaustively considered by that Court and a final decision reached. The case was that of Hong Kong & Shanghai Banking Corporation *v.* Rafferty, 15 Off. Gaz. 1970.

In the above case the defendant Rafferty was sued to recover taxes by him illegally collected. The question of interest was the main question and was decided against him. Another case involving the same question and very recently decided by the same Court is that of H. E. Heacock Co. *v.* Insular Collector of Customs, 37 Phil. 97.

In conclusion, attention is especially directed to the fact that petitioner herein is an individual; that interest was allowed by the Philippine Court, not against the government, but against an individual.

Respecting the item of costs allowed respondents Smith, Bell & Co., it would seem that this Court never interferes with local rules or laws governing costs. In the Philippine Islands Act 190, known as the Code of Civil Procedure, in Section 487, it provides that costs shall ordinarily be allowed to the prevailing party as a matter of course, but leaves to the sound discretion of the court to rule otherwise in special instances. Inspection of the decisions of the Philippine Court in the Smith, Bell & Co. case, indicated that the item of costs received very earnest consideration. One of the Justices dissented on the sole ground of the award of costs.

In conclusion, we would again invite the Court's attention to the fact that petitioner herein is an individual and not a government, and quote the following from the opinion of the Philippine Supreme Court ordering judgment for respondents Smith, Bell & Co.

> "With reference to the costs, Sec. 487 of Act 190, provides that: 'Costs shall ordinarily be allowed to the prevailing party as a matter of course, but the court shall have power, for special reasons, to adjudge that either party shall pay the costs of an action, or that the same be divided as may be equitable.' We have, as a matter of practice, always imposed costs upon the appellant who has failed in this Court to obtain a reversal or a modification of the judgment of the lower court. There seems to be no good reason in the present case for changing or modifying that rule."

VIII

SUMMARY

Petitioner's only hope is in the Act of Congress of June 5, 1920, which was enacted three months after respondents had secured final judgments in the court of last resort in the Philippine Islands.

If by the said Act of June 5, 1920, Congress intended to validate these taxes, this act was void because unconstitutional.

The intent of Congress expressed in the Act of June 5, 1920, was not to commit an unconstitutional act, not to act oppressively and against every principle of morality and decent government, but to validate taxes otherwise illegal between the dates of July 1, 1916, and August 29, 1916, leaving

untouched the illegal taxes petitioner had collected from respondents during the period from September 30, 1916, to October 1, 1917, and to recover which respondents had secured final judgments in the Supreme Court of the Philippines.

Petitioner does not allege any errors of law committed by the court below; consequently these applications for writs in this court should be forthwith denied.

It is respectfully submitted that the writs must be denied.

CLARENCE B. MILLER,
Attorney for Respondents.

Nos. [illegible]

Office Supreme Court, U.S.
FILED
APR 9 1921
JAMES D. MAHER
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1920.

JAMES J. RAFFERTY, as Collector of Internal Revenue for the Philippine Islands, Plaintiff-in-Error,

vs.

SMITH, BELL & COMPANY, LIMITED.

JAMES J. RAFFERTY, as Collector of Internal Revenue for the Philippine Islands, Plaintiff-in-Error,

vs.

COMPANIA GENERAL DE TABACOS DE FILIPINAS.

JAMES J. RAFFERTY, as Collector of Internal Revenue for the Philippine Islands, Plaintiff-in-Error,

vs.

VISAYAN REFINING COMPANY.

CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS

MOTION TO ADVANCE, AND CONSENT

WM. SIEGRIST, INC., PRINTER, 9-15 MURRAY ST., N. Y.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1920.

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CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

MOTION BY PLAINTIFF-IN-ERROR TO ADVANCE.

Comes now the plaintiff-in-error by his attorney and moves the Court to advance the above entitled causes and set them for hearing on June 13, 1921.

The cases all depend alike upon the determination of the question whether taxes which were paid by the defendants-in-error respectively, under protest, to the plaintiff-in-error, on shipments made from the Philippine Islands during the year from October 1, 1916, to September 30, 1917, aggregating Pesos 325,943.78 ($162,971.89), pursuant to the terms of Section 1614 of Act No. 2657 of the Philippine legislature of February 24, 1916 (Philippine Administrative Code of 1916), then in force, should be refunded on the ground that the collection of those taxes was in violation of Section 11 of the Philippine Organic or Autonomy (Jones) Act of Congress of August 29, 1916 (39 Stat., 545-548) to the effect that "No export duties shall be levied or collected on exports from the Philippine Islands," an Act of Congress having been approved June 5, 1920 (41 Stat., 1015, 1025), which purports to legalize and ratify the Section above mentioned of the Act of the Philippine legislature, and the collection of taxes under it. The plaintiff-in-error claims that the taxes so collected should be retained as property of the Government of the Philippine Islands.

The Court of First Instance of Manilla rendered judgments in favor of the defendants-in-error respectively and against the plaintiff-in-error, for the amounts of the taxes so paid with interest, and in No. 554 with costs, against the plaintiff-in-error here, on March 15, 16 and 18, 1920. Upon petitions in his behalf this Court granted writs of Certiorari to the Supreme Court of the Philippine Islands. Returns to those writs have been filed in this Court on March 9, 1921.

The amount involved is considerable, as stated above and the Government of the Philippine Islands is hampered and embarrassed in the conduct of its finances by uncertainty as to whether it will have to refund the taxes referred to. It is important therefore to the Gov-

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ernment of the Philippine Islands that the question involved be speedily determined, to the end that it be relieved of that uncertainty.

CHARLES MARVIN,
Attorney for Plaintiff-in-Error.

NEW YORK, March 24, 1921.

The undersigned is advised that other cases depending upon the same question and involving several million Pesoes are pending before the Supreme Court of the Philippine Islands, decision therein awaiting a decision here.

IN CENTER

CONSENT AND JOINDER IN MOTION BY DEFENDANTS-IN-ERROR.

The several defendants-in-error in the cases named above, by their attorney, consent to the granting of the foregoing Motion of the plaintiff-in-error to advance and to set the cases for hearing on the date there asked, and join in the motion.

CLARENCE B. MILLER,
Attorney for Defendants-in-Error.

WASHINGTON, D. C., March 28, 1921.

ADMISSION OF SERVICE.

Due service of the foregoing application by plaintiff-in-error and of due notice that it will be presented to this court on April 11, 1921, at the opening of court on that day or as soon thereafter as counsel may be heard, is hereby admitted.

CLARENCE B. MILLER,
Attorney for Defendants-in-Error.

WASHINGTON, D. C., March 28, 1921.

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In the Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 138

JAMES J. RAFFERTY, As Collector of Internal Revenue For the Philippine Islands, *Petitioner*,

v.

SMITH, BELL & COMPANY, LIMITED, *Respondent*.

No. 140

JAMES J. RAFFERTY, As Collector of Internal Revenue For the Philippine Islands, *Petitioner*,

v.

COMPANIA GENERAL DE TABACOS DE FILIPINAS, *Respondent*.

No. 142

JAMES J. RAFFERTY, As Collector of Internal Revenue For the Philippine Islands, *Petitioner*,

v.

VISAYAN REFINING COMPANY, *Respondent*.

BRIEF FOR PETITIONER ON THE MERITS

PRELIMINARY OBSERVATION

As these actions were commenced and prosecuted against the Collector of Internal Revenue for the Philippine Islands and not against the person who held or who is now holding that position in his individual or private capacity, it is agreed by counsel for all the parties that the

substitution of the name of the present Collector of Internal Revenue for that of James J. Rafferty may be considered as having been duly made.

STATEMENT OF THE CASES

The three above entitled cases are here on writs of certiorari issued to the Supreme Court of the Philippine Islands for the review of the judgments of that court holding illegal the collection of certain taxes and ordering the Collector of Internal Revenue, defendant below, to refund the same to the respective respondents, plaintiffs below. Although the three cases are submitted on one brief because all the questions in each case are essentially the same, a short statement of the facts will be made in each case.

Rafferty, Petitioner, v. *Smith, Bell & Company, Limited, No. 138.*

During the periods from October 1, 1916, to September 30, 1917, and from October 1, 1917, to December 31, 1917, Smith, Bell & Company, plaintiff below, sold and consigned to various persons and firms without the Philippine Islands merchandise, the produce of the Philippine Islands, of the value of P30,671,643.00 and P10,646,362.00, respectively, on which were levied and collected, over the protest of the company, under the provisions of Section 1614 of Act No. 2657 and Section 1459 of Act No. 2711, a tax of 1 per cent which amounted to P306,716.43 and P106,463.43 (R. 1-6). As a result of an action to recover, a judgment was entered in favor of the company and against the Collector of Internal Revenue for the refund of P306,716.43, without either interest or costs (R. 9). On appeal the Insular Supreme Court affirmed, on January 26, 1920, that judgment, with interest at the rate of 6 per cent on the separate amounts

from the dates of payment, "and costs as above indicated" (R. 12-17). When the judgment was entered on March 15, 1920, the words "and costs as above indicated" were omitted (R. 24).

Rafferty, Petitioner, v. *Compania General De Tabacos De Filipinas, No. 140.*

During the periods from January 1, 1916, to June 30, 1916, and from October 1, 1916, to December 31, 1916, the Compania General De Tabacos De Filipinas, plaintiff below, consigned to its agents abroad merchandise, the growth and produce of the Philippine Islands, of the value of P434,557.77 and P1,736,554.00, on which the Collector of Internal Revenue levied and collected, over the protest of the company, under the provisions of Acts 2541 and 2622, and Section 1614 of Act No. 2657, a tax of 1 per cent which amounted to P11,189.59 and P17,365.54 (R. 1-7). As a result of an action to recover, judgment was entered in favor of the company and against the Collector of Internal Revenue for the refund of P21,261.84, without either interests or costs (R. 9). On appeal the Insular Supreme Court modified, on February 18, 1920, the judgment of the trial court and entered, on March 16, 1920, a judgment in favor of the company for the sum of P17,365.54, with interest (R. 16).

Rafferty, Petitioner, v. *Visayan Refining Company, No. 142.*

During the months of November and December, 1916, the Visayan Refining Company, plaintiff below, shipped as owner 2,268,704 tons of cocoanut oil, worth P1,186,171.-00, to its agents in New York. The Collector of Internal Revenue levied and collected, over the protest of the company, under the provisions of Section 1614 of Act No. 2657, a tax of 1 per cent which amounted to P11,861.71 (R. 1-4). As a result of an action to recover, judgment

was entered in favor of the company and against the Collector of Internal Revenue for the refund of the amount thus collected, without either interest or costs (R. 7). On appeal the Insular Supreme Court affirmed on February 21, 1920, that judgment, with interest (R. 11). Final judgment was entered on March 18, 1920 (R. 13).

Assignment of Errors Applicable to the Three Cases.

The Insular Supreme Court erred:

1. In holding that the taxes levied and collected under the provisions of Section 1614 of Act No. 2657, known as the Administrative Code of 1916, on the merchandise sold and consigned by the respondents to the various persons and firms without the Philippine Islands, were duties or taxes on exports;
2. In failing to hold that the collection of said taxes had been duly legalized and ratified by the Act of Congress of June 4, 1918 (40 Stat. 597);
3. In holding that Act No. 2711 (Sec. 1459) repealed Section 1614 of Act No. 2657; and
4. In entering judgments against the Collector of Internal Revenue and in favor of the respondents, plaintiffs below, for the refund of the taxes in question, together with interest on the respective amounts.

We shall also urge that the collection of the taxes involved in these cases was duly legalized and ratified by the Act of Congress of June 5, 1920 (41 Stat. 1025).

ARGUMENT.

PART I.

The Insular Supreme Court erred in deciding that the taxes levied and collected under the provisions of Section 1614 of Act No. 2657, known as the Administrative Code, on the merchandise sold and consigned by the respondents

to various persons and firms without the Philippine Islands were duties or taxes on exports.

Origin and history of the law governing the percentage tax on merchants' sales.

By Sections 36 and 142 of Act No. 1189, the first real Internal Revenue Law enacted by authority of the United States in the Philippine Islands, and effective August 1, 1904, it was provided (Section 36) that no tax imposed on liquors, matches, cigars and cigarettes shall be collected on any portion of such articles as shall be actually exported; and that (Section 142) exporters, on the raw material and manufactured or partially manufactured products actually exported by them, shall be exempted from the payment of the taxes imposed in section one hundred and thirty-nine. This last mentioned section reads in part as follows:

> "Sec. 139. Except as hereinafter specifically exempted, there shall be paid by each merchant and manufacturer a tax at the rate of one third of one per centum on the gross value in money of all goods, wares, and merchandise sold, bartered, or exchanged for domestic consumption in the Philippine Islands, and this tax shall be paid whether such commodities consist of raw materials or manufactured or partially manufactured products, and whether of domestic production or imported."

By Act No. 2339, entitled "An Act revising and consolidating the laws relative to internal revenue" effective July 1, 1914, it was provided:

> "Sec. 40. Percentage tax on merchants' sales.—All merchants not herein specifically exempted shall pay a tax of one-third of one per cent on the gross value in money of the commodities, goods, wares, and merchandise sold, bartered, or exchanged by them, such tax to be based on the actual selling price

or value at which the things in question are disposed of whether consisting of raw material or of manufactured or partially manufactured products, and whether of domestic or foreign origin.

"Sec. 41. Sales not subject to merchants tax.—In computing the tax above imposed transactions in the following commodities shall be excluded:

(a) Merchandise actually exported by the vendor;

* * * * * *

"Sec. 55. Articles subject to specific tax.—Specific internal revenue taxes apply to things manufactured or produced in the Philippine Islands for domestic sale or consumption and to things imported from the United States or foreign countries, but not to any thing produced or manufactured here which shall be removed for exportation and is actually exported without returning to the Islands, whether so exported in its original state or as an ingredient or part of any manufactured article or product.

* * * * * *."

Section 5 of Act No. 2432 (Public Laws of the Philippine Islands, vol. 10, p. 151), December 23, 1914, amended Section 40 of Act No. 2339 by increasing the rate from one-third of one per cent to one per cent. Section 3 of Act No. 2541 (Public Laws of the Philippine Islands, vol. II, p. 125), effective by its terms from January 1, 1916, to December 31, 1917, amended Section 41 of Act No. 2339 by eliminating the phrase "(a) Merchandise actually exported by the vendor." Section 3 of Act No. 2622 (Public Laws of the Philippine Islands, vol. II, p. 278), effective as of January 1, 1916, amended the first paragraph of Section 40 of Act No. 2339, *supra*, by inserting the word "CONSIGNED" just after the word "bartered" therein. The first paragraphs of Sections 1614 and 1633 of Act No. 2657, known as the "Adminis-

trative Code of 1916," effective July 1, 1916, read as follows:

"Sec. 1614. Percentage tax on merchants' sales. —All merchants not herein specifically exempted shall pay a tax of one per centum on the gross value in money of the commodities, goods, wares, and merchandise sold, bartered, exchanged, or consigned abroad by them, such tax to be based on the actual selling price or value at which the things in question are disposed of or consigned, whether consisting of raw material or of manufactured or partially manufactured products, and whether of domestic or foreign origin. The tax upon things consigned abroad shall be refunded upon satisfactory proof of the return thereof to the Philippine Islands unsold."

"Sec. 1633. Articles subject to specific tax.— Specific internal revenue taxes apply to things manufactured or produced in the Philippine Islands for domestic sale or consumption and to things imported from the United States or foreign countries, but not to any thing produced or manufactured here which shall be removed for exportation and is actually exported without returning to the Islands, whether so exported in its original state or as an ingredient or part of any manufactured article or product."

Act No. 2711, effective by its terms October 1, 1917, amended certain sections of the Administrative Code of 1916, Act No. 2657, and changed the section numbers. The first paragraphs of Sections 1459 (old code, Section 1614) and 1478 (old code, Section 1633) read as follows:

"Sec. 1459. Percentage tax on merchants' sales. —All merchants not herein specifically exempted shall pay a tax of one per centum on the gross value in money of the commodities, goods, wares, and merchandise sold, bartered, exchanged, or consigned abroad by them, such tax to be based on the actual selling price or value of the things in question at the

time they are disposed of or consigned, whether consisting of raw material or of manufactured or partially manufactured products, and whether of domestic or foreign origin. The tax upon things consigned abroad shall be refunded upon satisfactory proof of the return thereof to the Philippine Islands unsold."

"Sec. 1478. Articles subject to specific tax.—Specific internal revenue taxes apply to things manufactured or produced in the Philippine Islands for domestic sale or consumption and to things imported from the United States or foreign countries, but not to anything produced or manufactured here which shall be removed for exportation and is actually exported without returning to the Islands, whether so exported in its original state or as an ingredient or part of any manufactured article or product."

It will thus be seen that the Philippine legislature has here defined and provided for the imposition and collection of two classes of internal revenue taxes—(1) percentage tax on merchants' sales, and (2) specific internal revenue taxes. From the enactment of Act No. 1189 on August 1, 1904, up to the approval of Act No. 2541 on January 1, 1916, the legislature expressly declared that in computing the percentage tax on merchants' sales transactions in merchandise actually exported by the vendors shall be excluded. But that express declaration was eliminated by Act No. 2541, effective January 1, 1916, and the word *"consigned"* was inserted in Section 40 of Act No. 2339 by Act No. 2622, likewise effective January 1, 1916. The word "abroad" was inserted in Section 1614 of the 1916 Code just after the new word "consigned" and carried forward into the 1917 Code. The provisions governing "specific taxes" remain unchanged from the beginning. The distinction between the "percentage tax" and the "specific tax" is quite clear. It is a distinction with a marked difference. Percentage taxes

are not of fixed amounts upon units, but are based upon the business or privilege of vending merchandise after the merchandise has lost its identity by becoming a part of the great mass of commodities. Specific taxes are of a fixed amount by "the head or number, or by some standard of weight or measurement and require no assessment other than a listing or classification of the subjects (in the original packages) to be taxed" (1 Cooley on Taxation 412).

Section 11 of the Act of Congress of August 29, 1916 (39 Stat. 545), known as the "Autonomy Act," reads in part as follows:

> "Sec. 11. That no export duties shall be levied or collected on exports from the Philippine Islands, but taxes and assessments on property and license fees for franchises, and privileges, and internal taxes, direct or indirect, may be imposed for the purposes of the Philippine Government and the provincial and municipal governments thereof, respectively, as may be provided and defined by acts of the Philippine legislature, and, where necessary to anticipate taxes and revenues, bonds and other obligations may be issued by the Philippine government or any provincial or municipal government therein, as may be provided by law and to protect the public credit. * * *."

Of the merchandise sold and consigned abroad by the respondents and upon the money value of which the percentage taxes in question were collected, the record fails affirmatively to disclose to what country or countries such merchandise was sold or consigned by Smith, Bell & Company, Ltd., Case No. 138, and the Compania General De Tabacos De Filipinas, Case No. 140. In the first it was alleged that the merchandise was sold and exported from the Philippine Islands. The answer admitted that these allegations were true. In the second it was alleged that the merchandise was exported from the Philippine Islands, being at the time of exportation, during the course

of transportation and at the time of arrival at the ports of destination, the exclusive property of the plaintiff. In the answer it was alleged that the "plaintiff consigned to its agents abroad" the merchandise mentioned in the complaint. The Visayan Refining Company, Case No. 142, alleged that the merchandise was exported from the Philippine Islands to the port of New York. The answer alleged that the merchandise was shipped from the Philippine Islands to New York, consigned to the agents of the plaintiff. No other evidence was offered in either of the cases.

Section 11 of the Act of August 29, 1916, provides "that no export duties shall be levied or collected on exports from the Philippine Islands." In *Kepner* v. *United States,* 195 U. S. 100, 124, it was said:

> "It is a well-settled rule of construction that language used in a statute which has a settled and well-known meaning, sanctioned by a judicial decision, is presumed to be used in that sense by the legislative body."

The inquiry arises whether merchandise shipped direct from the Philippine Islands to the United States may be regarded as "exports" within the meaning of Section 11 of the Act of August 29, 1916. If the answer be in the affirmative, it then becomes immaterial as to what ports abroad, if any, the merchandise set forth in the complaints in cases numbers 138 and 140 were consigned in so far as the definition of the term "exports" is concerned.

The definition of the word "export" as given in most of the adjudged cases and elsewhere refer to the taking of goods from one country to another, this being ordinarily the only case in which export duties are imposed. There are, however, exceptions to this rule. The word may be used in reference to the taking of goods from one part of

the country to another (*Barrett* v. *Railway Company*, 2 Manning & Granger, 538, 543) or from one state to another (*Dooley* v. *United States*, 183 U. S. 151, 153). In tariff legislation, the word "exported" does not necessarily imply that the goods must be shipped to a foreign country in a technical sense. As late as August 23, 1907, the Attorney General of the United States held that "it is nevertheless clear that under the special legislation relating to the temporary organization of the Philippine Islands, they are treated as territory remaining as yet outside of the United States in a tariff sense for the purpose of imposing duties on articles shipped from them 'into' the United States analagous to those imposed on imports from a foreign country, and having such status that the term 'imports' can be naturally and properly applied to merchandise brought from them into the United States, a view which is supported by the language used in the opinion of the court in *Downes* v. *Bidwell*, 182 U. S. 244, 287," (26 Ops. Atty. Gen., 355, 360). Up to that time Congress had subjected merchandise shipped from the Philippine Islands to the United States to a customs duty differing only in amount from that imposed on merchandise from foreign countries.

By the United States and the Philippine tariff acts of August 5, 1909, a reciprocal free trade arrangement between the two countries was established. Both acts were approved on the same day, the former at 5.05 p. m., to take effect the following day; and the latter at 5.08 p. m., to take effect after sixty days. Under Section 5 of the United States Tariff Law and Section 12 of the Philippine Tariff Law, articles of American growth, product, or manufacture, upon which no drawback of customs duties had been allowed, could enter the Philippine Islands free; and in turn, all articles, the growth or product of, or manu-

factured in, the Philippine Islands, to the extent and under the conditions stated in said Section 5, could enter the United States free of duty. Such merchandise was not subject to the internal revenue tax of either country before being shipped. Section 13 of the Philippine Act provided that upon "the exportation to any foreign country from the Philippine Islands, *or shipments* thereof to the United States or any of its possessions" of certain articles, they shall be subject to export duties except as therein set forth. It was at that time and by reason of that free-trade arrangement that the words "import" and "export" began to take on a new meaning when used with reference to the shipment of goods from the one country into the other.

The above-mentioned sections 5, 12 and 13 were repealed by the Act of October 3, 1913, (38 Stat. 114, 192). By Section 4 of the Act of October 3, 1913, the provisions of Sections 5 and 12 of the Act of August 5, 1909, relating to the reciprocal free trade arrangements between the United States and the Philippine Islands, were reenacted and enlarged by removing the restrictions as to the amounts of certain articles from the Philippine Islands which should be admitted free into the United States, and repealed said Section 13. The provisions exempting the merchandise shipped from one country into the other from the payment of the internal revenue taxes before shipment were likewise reenacted.

While the enacting clause of the Act of October 3, 1913, stated that "there shall be levied, collected, and paid upon all articles when *imported* from any foreign country into the United States or into any of its possessions (except the Philippine Islands and the islands of Guam and Tutuila) the rates of duty" set forth in the Act, paragraph C of Section 4 provides that "there shall be levied, collected, and paid upon all articles *coming into*

the United States from the Philippine Islands the rates of duty which are required to be levied, collected, and paid upon like articles imported from *foreign countries; Provided,* * * *." (Italics supplied). The words "imported" and "exported" are not used in paragraph C of Section 4 in connection with the shipment of goods from the United States to the Philippine Islands or *vice versa,* but the terms "coming into," "going into" and "shipped" are employed. All articles, the growth or product of the Philippine Islands, coming into the United States from the Philippine Islands, are admitted free of duty. Hence, the Philippine Islands have thus been brought *within* the United States in a tariff sense and merchandise now shipped from the Philippine Islands into the United States cannot be held to have been *imported* in a tariff sense into this country. It is settled that the terms "imports" and "exports" as used in that clause of the Constitution which declares that "no state shall, without the consent of Congress, lay any imposts or duties on imports or exports" have reference to goods brought from or carried into foreign countries alone, and not to goods transported from one state to another (*Brown* v. *Houston,* 114 U. S. 622). "Whether the laying of such duties by a state would not violate some other provision of the Constitution, that, for example, which gives to Congress the power to regulate commerce with foreign nations, among the several states, and with the Indian tribes, is a different question" (*Id.* 630). Section 10 of the Act of August 29, 1916, declares "That while this Act provides that the Philippine Government shall have the authority to enact a tariff law the trade relations between the Islands and the United States shall continue to be governed exclusively by the laws of the Congress of the United States: *Provided,* That tariff acts or acts amendatory to the tariff of the

Philippine Islands shall not become law until they shall receive the approval of the President of the United States, * * *." True it is that paragraph C, Section 4 of the Act of October 3, 1913, after providing that all articles, the growth or product of the Philippine Islands shipped into the United States shall be admitted free of duty, declares that such articles "shall be exempt from the payment of any tax imposed by the internal revenue laws of the Philippine Islands."

The merchandise, which was the growth or product of the Philippine Islands, was sold or consigned abroad or without the Philippine Islands by the respondents. That part of such merchandise which was consigned to persons or firms within the United States and which thereafter entered this country was not *exported* in a tariff sense from the islands. But that part, if any, which was consigned and shipped to persons and firms in *foreign countries* was *exported* from the islands. Anyway, the percentage taxes which forms the basis of these actions were not "internal revenue taxes imposed upon the shipment of goods into the United States," nor imposts or duties on exports. We have already pointed out the law touching the character and mode of the assessment of these percentage taxes. They were percentage taxes upon *transactions* involving the sale or consignment abroad of merchandise which was not in the original packages but which was a part of the general mass of goods. They were not taxes imposed upon the merchandise because of any special qualities it may have had. They were general taxes laid on all such transactions alike, based upon the gross money value of the goods involved. The assessment did not amount to any interference with, or restriction upon the free movement of the goods to any port of the world. In fact, the goods were gone *abroad* before any attempt was

made to collect the taxes. The assessment amounted only to an exercise of local administration under the general taxing power of the Philippine Government, which, though it may have incidentally affected the subject of commerce, was entirely within the power of that government. Every tax imposed directly or indirectly upon property may affect more or less the operations of commerce by diminishing the profits to be derived therefrom, but it does not for that reason amount to a regulation of commerce, within the meaning of the Constitution or Acts of Congress upon the subject. "A duty on exports must either be a duty levied on goods as a condition, or by reason of their exportation, or, at least, a direct tax or duty on goods which are intended for exportation. Whether the last would be a duty on exports, it is not necessary to determine." (*Brown* v. *Houston, supra*). The internal revenue tax referred to in paragraph C of Section 4 of the Act of October 3, 1913, is of the same character as a tax or duty on exports.

Crew Levick Company v. *Commonwealth of Pennsylvania, Distinguished.*

Both the Insular Supreme Court and counsel for respondents relied upon the case of *Crew Levick Company* v. *Commonwealth of Pennsylvania,* 245 U. S. 292, as authority for holding that Section 1614 of Act No. 2657 in so far as it imposes a tax of 1 per cent upon the gross value in money of goods sold or consigned abroad, was in conflict with Section 11 of the Act of August 29, 1916, wherein it is provided "that no export duties shall be levied or collected on exports from the Philippine Islands."

The essential facts are stated in the opinion of the court as follows: By an Act of May 2, 1899, the State

of Pennsylvania imposes an annual mercantile lincense tax upon each wholesale vendor or dealer in merchandise, and "one-half mill additional on each dollar of the whole volume, gross, of business transacted annually," and like taxes at another rate upon retail vendors, and at still another upon vendors at an exchange or board of trade. In 1913 the Crew Levick Company sold and delivered at wholesale, from a warehouse located in Pennsylvania, merchandise to the value of about $47,000 to purchasers within the State, and merchandise to the value of about $430,000 to customers in foreign countries. The State Courts sustained the tax on the $430,000, overruling the contention that it amounted to a regulation of foreign commerce and also was an impost or duty on exports levied without authority of Congress.

The court, in reversing the judgment of the Supreme Court of the State, said (p. 295):

> "The bare question, then, is whether a state tax imposed upon the business of selling goods in foreign commerce, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries, is in effect a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the Federal Constitution. Although dual in form, the question may be treated as a single one, since it is obvious that, for the purposes of this case, an impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms. And there is no suggestion that the tax is limited to the necessities of inspection, or that the consent of Congress has been given.
>
> "We are constrained to hold that the answer must be in the affirmative."

There is no difference between interstate commerce and foreign commerce, says the court, in "so far as the present question is concerned." This is true because the power to

regulate commerce among the several states (except as to merely local matters) is just as exclusive a power in Congress as is the power to regulate commerce with foreign nations and with the Indian tribes.

Section 2 of the Pennsylvania Act provides "that all persons who shall sell to dealers in or vendors of goods, wares and merchandise, and to no other person or persons, shall be taken under the provisions of this Act to be wholesalers; and all other vendors of or dealers in goods, wares and merchandise shall be retailers." The merchandise of the wholesaler remains in the original packages until it reaches the retailer when it then becomes for the first time available to the consumer or a part of the general mass of property. Not so in respect to retail dealers. No retailer could escape the payment of one mill on each dollar of the whole volume, gross, of retail business transacted by him with citizens or residents of other states upon the ground that such a tax would be an impost upon exports, because those transactions could not in the very nature of things amount to a regulation of interstate commerce. No such tax can be deemed a duty or impost on imports or exports unless it *regulates* to an appreciable extent foreign commerce or commerce among the several states, or with the Indian tribes. Or in other words, if a particular tax is in such a form as primarily to be a rule to regulate commerce, and only a tax in its secondary effect, then it is in fact and in law an impost or duty on exports or imports. A law which imposes a tax of one-half mill on each dollar of the whole volume, gross, of business transacted annually by wholesalers is a tax upon "the business of selling goods in foreign commerce, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries," and it is therefore primarily a rule to regulate commerce and only a tax in its secondary effect.

Is the Philippine statute, Act No. 2657, in such a form as primarily to be a rule to regulate commerce and only a tax in its secondary effect? If it is, then the taxes therein imposed are in fact duties on exports or imports as the case may be.

Section 1593 reads in part as follows:

> "Sec. 1593. Sources of taxes.—The following taxes, fees and charges in the nature of tax are deemed to be internal revenue taxes:
>
> (a) The cedula tax.
>
> (b) The documentary tax.
>
> (c) The privilege taxes on business or occupation and on signs.
>
> (d) Specific taxes on manufactured products."

Section 1614 provides that:

> " 'Merchant,' as here used, means a person engaged in the sale, barter, or exchange of personal property of whatever character. Except as specially provided, the term includes manufacturers who sell articles of their own production and commission merchants having establishments of their own for the keeping and disposal of goods of which sales or exchanges are effected, but does not include merchandise brokers."

Section 1615 reads:

> "Sec. 1615. Sales not subject to merchants' tax. —In computing the tax above imposed transactions in the following commodities shall be excluded:
>
> (a) Things subject to a specific tax.
>
> (b) Agricultural products when sold by the producer or owner of the land where grown, or by any other person other than a merchant or commission merchant, whether in their original state or not."

The privilege taxes on the business or occupation of a merchant are of two kinds: (1) A fixed annual tax, and (2) a percentage tax on the merchandise sold, bartered,

exchanged, or consigned abroad, measured by the gross value in money at the time of the transaction. These taxes are imposed upon the *privilege* of doing business in the Philippine Islands and not upon the *right* to export or import, nor upon goods because of the fact that they are being exported or are intended to be exported or that they have been imported. The fact that some of the goods may be exported cannot make the general tax a duty on exports for the reason that the exportation is merely incidental and does not form the basis for the tax. This is especially true in the instant cases because the goods sold or consigned abroad by the respondents were all the *products* of the Philippine Islands. They were a part of the general mass of personal property of that country. They had never commenced their final movement for transportation abroad when the percentage tax attached. They were agricultural or forest products assembled for the purpose probably of exportation, but they were not exports when the transactions of sale or consignment abroad accrued. They were still within the country of their origin and a part of the general mass of property of the Islands, and liable to taxation there. (*Coe* v. *Errol,* 116 U. S. 517, and *Turpin* v. *Burgess,* 117 U. S. 504.)

While the Philippine statute, Act No. 2657, defines the term "merchant," it makes no distinction between wholesale and retail dealers as was done in the Pennsylvania Act. It also makes provisions for the refund of the taxes upon proof of the return to the Philippine Islands of the merchandise consigned abroad unsold. And transactions in commodities which are subject to a specific tax and in agricultural products when sold by the producer or persons other than merchants were not subject to the percentage tax.

Again, Smith, Bell & Company, respondents in case No. 138, was a corporation organized under the laws of the Philippine Islands. It is a "merchant"—not a wholesaler doing business with dealers in or vendors of merchandise and no others, but dealing with all persons regardless of their business or occupation. This respondent is engaged in assembling the native products and selling them in the best markets. The fact that some of its goods are actually exported by it makes no difference, because, as we have said, the goods were in the Philippine Islands and were a part of the general mass of property of that country at the time the percentage tax attached. The goods or products had not at that time ceased to be governed by the domestic law and begun to be governed by the law regulating commerce with foreign countries or with the United States. The same is true as to the other two respondents, and there are other reasons which go to show that the percentage taxes paid by them were not taxes or duties on exports within the meaning of Section 11 of the Act of August 29, 1916. Those taxes were paid upon the *transactions* involved in the consignment of the native products abroad. In so far as the percentage tax on such transactions by merchants was concerned, those products were not exports even on arrival at their destination because the title did not pass and they therefore became no nearer the consumer as they did not then enter the markets. The products could probably be considered exports while in route in respect to *transportation* and *intercourse*, but not otherwise.

In *Crew Levick Company* v. *Commonwealth of Pennsylvania, supra,* that company was a wholesale dealer in merchandise in unbroken or original packages, and was not engaged in assembling the native products of the State

by purchasing them from any and all persons regardless of their business or occupation.

PART II.

The collection of the taxes in question legalized and ratified by the Acts of Congress of July 1, 1916, and June 4, 1918.

As pointed out above there were three periods pertinent to the present inquiry during which the percentage taxes on merchants' sales were imposed. The first period was from January 1, 1916, to July 1, 1916, under the provisioins of Act No. 2541, as amended by Act No. 2622; the second period was from July 1, 1916, to October 1, 1917, under Section 1614 of Act No. 2657; and the third period was subsequent to October 1, 1917, under Section 1459 of Act No. 2711. All the taxes now in question were levied and collected during the second period and under the provisions of Section 1614 of Act No. 2657.

By the Act of Congress approved July 1, 1916 (39 Stat. 262, 286), it was provided:

> "That the internal revenue taxes imposed by the Philippine legislature under the law enacted by that body on December twenty-first, nineteen hundred and fifteen (Act No. 2541), as amended by the law enacted by that body on February fourth, nineteen hundred and sixteen (Act No. 2622), and the tonnage tax on vessels engaged in foreign trade, enacted by that body on February fourth, nineteen hundred and sixteen, are hereby legalized and ratified, and the collection of all such taxes heretofore or hereafter is hereby legalized, ratified and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

And by Act of Congress approved June 4, 1918 (40 Stat. 594, 597), it was provided that:

> "The taxes imposed by the Philippine Legislature in section fourteen hundred and fifty-nine of the Act numbered twenty-seven hundred and eleven, enacted by that body on March tenth, nineteen hundred and seventeen, are hereby legalized and ratified, and the collection of all such taxes heretofore or hereafter is legalized, ratified, and confirmed hereby as fully to all intents and purposes as if the same by prior Act of Congress specifically had been authorized and directed."

The three actions were commenced by filing the complaints on February 7, 1918 (R. 1, No. 138), on January 24, 1917, (R. 1, No. 140) and on January 20, 1917 (R. 1, No. 142), respectively. Final judgments, in so far as the Insular Supreme Court was concerned, were entered, as shown in the statements of facts, on March 15, 1920, on March 16, 1920, and on March 18, 1920. The result is that the first act of Congress was approved before either of these actions was instituted and that the second Act became effective before the final judgments in the sense indicated were entered. The court below having held that the Acts of Congress did effectively legalize, ratify and confirm the collection of the taxes levied and collected under the provisions of the Acts therein specifically mentioned, we will confine our argument under this sub-heading to the question whether the taxes levied and collected under the provisions of Section 1614 of Act No. 2657 were also legalized and ratified by the one or the other or both of the said Acts of Congress. The power of Congress in the premises will be inquired into in considering the force and effect of the Act of Congress of June 5, 1920 (41 Stat. 1015, 1025).

Under Section 2 of Act No. 2541, amending Section 40 of Act 2339, merchants were required to pay 1 per cent

"on the gross value in money of the commodities, goods, wares, and merchandise sold, bartered, or exchanged by them." By Section 3 of the same Act, Section 41 of Act No. 2339 was amended by eliminating the phrase "merchandise actually exported by the vendor." And Act No. 2622 amended Section 40 of Act No. 2339, as amended by Section 2 of Act No. 2541, so as to require merchants to pay 1 per cent "on the gross value in money of the commodities, goods, wares, and merchandise sold, bartered, *consigned,* or exchanged by them."

The enacting clause of Act No. 2657, known as the Administrative Code of 1916, reads:

> "The general statutes relative to the organization and administration of the Philippine Government as revised, compiled, and codified pursuant to the provisions of Act Numbered nineteen hundred and forty-one are hereby adopted and enacted into law, effective upon the first day of July, nineteen hundred and sixteen as follows:"

Section 1614, *supra,* requires merchants to pay a tax of 1 per cent "on the gross value in money of the commodities, goods, wares, and merchandise sold, bartered, exchanged, or *consigned abroad* by them * * *. The tax upon things consigned abroad shall be refunded upon satisfactory proof of the return thereof to the Philippine Islands unsold."

The "final section" reads in part as follows:

> "The Acts and parts of Acts enumerated in the following schedule are hereby repealed: (a) Acts repealed in entirety; * * * No. 2622; (b) Acts repealed in part; * * * No. 2541, Sections 1, *2, 3,* 6, 8, 9, 16, 17, and 18."

The enacting clause of Act No. 2711, "An Act amending the Administrative Code," reads as follows:

"For the purpose of adapting it to the Jones Law (Act of Congress of August 29, 1916, 39 Stat. 545) and the reorganization Act (Act No. 2666), Act Numbered two thousand six hundred and fifty seven, known as The Administrative Code, is hereby amended in certain particulars; and said Act shall hereafter read as follows: Section 1—Title of Act. —This Act shall be known as the Administrative Code."

The first paragraph of Section 1459 of this Act is exactly the same as the first paragraph of Section 1614 of Act No. 2657, *supra,* except the phrase in that paragraph "such tax to be based on the actual selling price or value at which the things in question are disposed of or consigned" is now made to read "such tax to be based on the actual selling price or value of the things in question at the time they are disposed of or consigned." This is a mere rearrangement of the words without changing the meaning of the phrase.

The "final section" of Act No. 2711 reads in part as follows:

"Final section.—This Act shall take effect upon the first day of October, nineteen hundred and seventeen; but the Governor-General may proclaim any part hereof to be in effect at any time subsequent to its approval and prior to said date.

"The Acts and parts of Acts enumerated in the following schedule are hereby repealed:

"(a) Acts repealed in entirety.

"* * *. Act No. 2541, * * *, 2622."

The Act of July 1, 1916, *supra,* legalized and ratified the internal revenue taxes imposed under Act 2541, as amended by Act 2622, and legalized, ratified and confirmed the collection of all such taxes heretofore or hereafter made thereunder. So long as that law remained in force, the imposition and collection of taxes in accordance therewith had Congressional sanction. All merchants

"not herein specifically exempted" were required to pay 1 per cent on all the merchandise sold, bartered, consigned, or exchanged by them, and transactions in merchandise actually exported by the vendors were not excluded by express language. No provisions were made for the refund of the taxes upon the things consigned abroad upon satisfactory proof of the return thereof to the Philippine Islands unsold. There was room for argument as to whether the legislature intended to impose the tax upon transactions in merchandise actually *consigned abroad* by the vendors. The word "consigned" could have been used in the sense of limiting the transactions to the Philippine Islands. This view finds support in the fact that no provisions were then made for a refund of the taxes under the conditions subsequently stated, and in the further fact that Act No. 2657 repealed Act No. 2622 in its entirety and sections 2 and 3 of Act No. 2541. However this may be, we do not press that point.

The question whether the Act of June 4, 1918, *supra*, did effectively legalize and ratify the collection of the taxes imposed under the provisions of Section 1614 of Act. No. 2657 is, we think, practically free from doubt. That Congress legalized and ratified the taxes imposed in Section 1459 of Act No. 2711, enacted March 10, 1917 (effective October 1, 1917), and legalized, ratified, and confirmed the collection of all such taxes *heretofore* or hereafter made thereunder is clear. The inquiry arises whether Congress intended to extend the effect of its Act to Section 1614. In pursuing this inquiry, it will be remembered that the "first period" was covered by the Act of July 1, 1916; and the "third period" by the Act under consideration. Why should the "second" or middle period be left out? All the taxes were imposed, it was claimed, upon exports and were therefore illegal.

The enacting clause of Act No. 2711, "An Act Amending Administrative Code," declares that Act No. 2657 "is hereby amended in certain particulars; and *said Act* shall hereafter read as follows:" (italics supplied). While there are under the "final section" lists of "Acts repealed in entirety" and of "Acts repealed in part," Act No. 2657 does not appear in either. And the first paragraph of Section 1459 is exactly the same as the first paragraph of Section 1614 of Act 2657, except the rearrangement of certain words in the manner just indicated.

The Court below held that—

> "Act No. 2711 (Section 1459) expressly repealed Section 1614 of Act No. 2657. The amendment of Section 1459 of Act No. 2711 made no important changes in Section 1614 of Act No. 2657. * * *.
>
> "The defendant-appellant contends that the Act of Congress of June 4, 1918, had the effect of ratifying Section 1614 of Act No. 2657. There might be some merit in that contention if Congress had ratified or recognized the authority of the Philippine Legislature to impose an export tax. Upon the contrary, however, we find (a) that Congress, in Section 11 of the Jones Law, expressly deprived the legislature of such power and (b) by said Act of June 4, 1918, ratified only the particular Act (2711) by mentioning the particular section in question. The ratification can only be held to be a ratification of the law mentioned in it. If Congress had intended to ratify the general power in the Philippine Legislature and that specific Act, it would have so stated and would not have ratified and legalized a specific section of a specific law. The ratification cannot be held to go beyond its terms. * * *." (*Rafferty* v. *Smith, Bell & Co., Ltd.*, No. 138 (R. 13, 15).

That there was error in deciding that Section 1614 of Act No. 2657 was expressly repealed by Section 1459 of Act No. 2711 is quite clear. While Act No. 2657 was

amended in "certain particulars; and *said* Act shall hereafter read as follows," there was no amendment except in "certain particulars" and Section 1614 was not one of those "particulars." It was given a new section number but nothing more. It remained a part of "said Act." We agree with the Insular Supreme Court that Congress, "by said Act of June 4, 1918, ratified only the particular Act (2711) by mentioning the particular section in question. The ratification can only be held to be a ratification of the law mentioned in it." But the law mentioned in the Act of June 4, 1918, is Section 1459 of Act No. 2711 which is Section 1614 of Act No. 2657—one and the same thing. That Congress intended to ratify the collection of the taxes in question is apparent from the Senate and House Hearings on Deficiency Appropriations, 1918 and 1919, pp. 403-405. While the hearing was had on May 21, 1918, it was based on a letter from the Secretary of War dated January 7, 1918, just a little over three months after Act No. 2711 became effective. In that letter the Secretary of War in reviewing the subject states that the percentage tax law was amended so as to make it specifically applicable to goods "consigned abroad;" that the Governor-General had advised the Department that the Court of First Instance had decided that the tax of 1 per cent on the gross value of goods consigned abroad was a tax on exports and prohibited by the Jones Law; that an appeal had been taken to the Supreme Court; and that if the decision of the lower court was affirmed the Philippine Government would have to refund approximately $2,000,000 to exporters who had naturally protected themselves in the payment of this tax by an extra charge on the goods sold. The Chairman of the Committee, referring to the letter of the Secretary of War, then stated that the Secretary's letter proposed the

ratification of a provision levying a tax upon goods consigned abroad in order to ratify collections then having been made to the extent of $2,000,000, and to permit the continuation of the same taxes.

As heretofore indicated, the Act No. 2711 became effective October 1, 1917, the first day of the last calendar quarter of that year. Under Section 1458 of Act No. 2711, the percentage taxes were payable at the end of the quarter but the merchant could avoid the penalty by making his return and paying the taxes at any time before the twentieth day of the incoming month. It is therefore plain that the Governor-General did not have in mind the percentage taxes collected under Section 1459 of Act No. 2711 when he advised the Department that the court had decided that the tax of 1 per cent on the value of goods consigned abroad was prohibited by the Jones Law and that if that decision was affirmed on appeal the Philippine Government would have to refund about $2,000,000 to exporters, because such taxes had not yet been collected. He referred to the taxes collected under Section 1614 of Act No. 2657 subsequent to the approval of the Jones Law.

For the foregoing reasons, we insist that the Insular Supreme Court erred (a) in deciding that the collection of the percentage taxes imposed in Section 1614 of Act No. 2657 was not ratified and confirmed by the Act of June 4, 1918, and (b) in holding that said Section 1614 was repealed by Section 1459 of Act No. 2711.

ERROR TO ALLOW INTEREST.

These three suits against the Collector of Internal Revenue for the Philippine Islands are suits against the Philippine Government (*Lankford* v. *Platte Iron Works*,

235 U. S. 461). While prior provisions of law governing the recovery of taxes paid under protest had no express prohibition against the allowance of interest, Section 1579 of Act No. 2711, effective October 1, 1917, expressly provides that actions may be brought against the Collector of Internal Revenue for the recovery, *without interest,* of the sums alleged to have been illegally collected as taxes. At the time of the institution of the action by Smith, Bell & Co., Ltd., and at the time judgments were ordered by the Court of First Instance in the other two cases, Section 1579 was in force. Judgments for interest could not therefore properly be awarded (*Ex parte McCardle,* 7 Wall., 506, 574). But it is said that interest was allowed by the Philippine Supreme Court not against the government but against an individual, James J. Rafferty, although the judgments for the refund of the amounts of the taxes are to be paid by the government from the public treasury. This argument fails to recognize the fact that Rafferty acted as an official of the government under a statute which authorized and directed him to collect the taxes in question. The claim is not predicated upon any misconduct of Rafferty.

ERROR TO ALLOW COSTS.

The Insular Supreme Court allowed costs in the case of Smith, Bell & Co., Ltd., No. 138. The rule is well settled that, unless expressly authorized by statute, a judgment for costs either in civil or criminal cases cannot be rendered against the United States or a state in which either is a party. If authorities were necessary to support this proposition, we would invite the court's attention to those cited by Mr. Justice Malcolm in his dissenting opinion in this case (R. 17-18). The rule is the same

in the Philippine Islands. "The practice has, however, been not to allow costs in cases in which the Government of the Philippine Islands or a nominal representative of the Government is the unsuccessful party. And this is right—for the Government of the Philippine Islands is sovereign in the sense that a State of the American Union or Porto Rico is sovereign, and this paramount power has not by statute permitted itself to be taxed with costs" (*Hongkong & Shanghai Banking Corporation* v. *Rafferty*, 39 Phil. Reps. 145, 154). The fiction that the suit is against the individual and not against the Philippine Government calls for no consideration whatever at this late day.

PART III.

The Act of June 5, 1920, legalized, ratified, and confirmed the collection of the taxes in question.

It will be remembered that the three actions were commenced in the trial court by the filing of the complaints in February, 1918, and January, 1917, and that final judgments, in so far as the Insular Supreme Court was concerned, were entered in March, 1920. The pertinent provisions of the Act of Congress approved June 5, 1920 (41 Stat. 1015, 1025), read as follows:

> "The taxes imposed by the Philippine legislature in Section 1614 of the Act numbered 2657, enacted by that body on February 24, 1916, are legalized and ratified, and the collection of all such taxes made under or by authority of such Act of the Philippine Legislature is legalized, ratified, and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

As this language is in our judgment unambiguous and manifests as explicitly as can be done the purpose of Con-

gress to legalize, ratify, and confirm the collection of *all* the taxes imposed under the provisions of Section 1614 of Act No. 2657, the question whether Congress possessed that power is, we think, the determinative factor. The case of the *United States* v. *Heinszen & Company*, 206 U. S. 370, is authority for the reduction of the controversy to its ultimate issue. In that case Heinszen & Company, the claimant below, instituted its action, on July 1, 1902, in the Court of Claims "to recover the amount of tariff duties exacted in the Philippine Islands on merchandise brought from the United States, the duties having been collected under the authority of the President after the ratification of the treaty, but before the time when Congress, by Section 1 of the Act of March 8, 1902, had enacted tariff duties for the Philippine Islands. The case was pending in the Court of Claims when the Lincoln and Warner, Barnes & Company cases were decided by this court" (206 U. S. 381). The Court of Claims overruled, on January 7, 1907, the demurrer of the United States, defendant below. *Conrad Heinszen et al.*, v. *United States*, 42 Ct. Cls. 58. The case was argued in the Supreme Court of the United States on April 9, 10, 1907, and decided May 27, 1907. By Act of Congress of June 30, 1906 (34 Stat. 636), it was provided:

> "That the tariff duties, both import and export, imposed by the authorities of the United States or of the provisional military government thereof in the Philippine Islands prior to March eighth, nineteen hundred and two, at all ports and places in said islands, upon all goods, wares, and merchandise imported into said islands from the United States, or from foreign countries, or exported from said islands, are hereby legalized and ratified, and the collection of all such duties prior to March eight, nineteen hundred and two, is hereby legalized and rati-

fied and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

After quoting the foregoing provisions of the Act of June 30, 1906, the Court of Claims observed that:

> "It must be admitted that this provision is unmistakable in its language and broad enough to completely cover the case if it is possible for Congress so to do." (p. 68.)

That court held the Act unconstitutional upon the ground "that retrospective statutes relating to defects in tax proceedings are valid only to the extent of curing such defects as are in the nature of irregularities, and cannot extend to matters of jurisdiction." (p. 74.)

On review, the Supreme Court of the United States (206 U. S. 370, 382), while agreeing with the Court of Claims that "such tariff exactions were illegal," said:

> "It follows therefore that the only question open for consideration is whether the court below erred in refusing to give effect to the Act of Congress of June 30, 1906, which ratified the collection of the duties levied under the order of the President."

The court, after an exhaustive examination of the authorities, held that the Act in question was effectively curative and reversed the judgment of the Court of Claims. Hence, it must be conceded that if the cases under consideration had been pending in the Court of First Instance, as was the case of the *United States* v. *Heinszen & Company,* recovery would be completely foreclosed by the Act of June 5, 1920, *supra.*

Did the fact that the actions now under consideration had ripened into final judgments to the extent heretofore stated operate to deprive Congress of its power to ratify the collection of the taxes? We think not. The judg-

ments were not final in the sense that they disposed of the litigation between the parties to the actions.

Section 27 of the Act of August 29, 1916 (39 Stat. 545, 555), provides:

> "That the Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the Supreme Court of the Philippine Islands in all actions, cases, causes, and proceedings now pending therein or hereafter determined thereby in which the Constitution or any statute, treaty, title, right, or privilege of the United States is involved, or in causes in which the value in controversy exceeds $25,000, or in which the title or possession of real estate exceeding in value the sum of $25,000, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; and such final judgments or decrees may and can be reviewed, revised, reversed, modified, or affirmed by said Supreme Court of the United States on appeal or writ of error by the party aggrieved within the same time, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the district courts of the United States."

And Section 5 of the Act of September 6, 1916, (39 Stat. 727), provides:

> "That no judgment or decree rendered or passed by the Supreme Court of the Philippine Islands more than sixty days after the approval of this Act shall be reviewed by the Supreme Court upon writ of error or appeal; but it shall be competent for the Supreme Court, by certiorari, or otherwise, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error or appeal, any cause wherein, after such sixty days, the Supreme Court of the Philippine Islands may render

or pass a judgment or decree which would be subject to review under existing laws."

Section 6 of the Act of September 6, 1916, *supra,* provides that writs of certiorari addressed to the Supreme Court of the Philippine Islands must be applied for within six months after the entry of the judgment or decree complained of. This provision was complied with in each of the three cases under consideration.

The power of this court to review the judgments and decrees of the Supreme Court of the Philippine Islands is limtied to the two general classes of cases mentioned in Section 27 of the Act of August 29, 1916, *supra.* In the one it is the nature of the case, and in the other it is the amount involved, which are the tests of jurisdiction. If a particular case is one which falls within the first general class because the Constitution or a statute of the United States is "involved," then it will be necessary to inquire whether the "matter is of sufficient importance in itself, and sufficiently open to controversy, to make it the duty of this court to issue the writ applied for in order that the case may be reviewed and determined as if brought here on appeal or writ of error (*Lau Ow Bew, Petitioner,* 141 U. S. 583, 587).

In case No. 138, Rafferty, etc *v.* Smith, Bell & Company, the last paragraph of the opinion of the Insular Supreme Court promulgated on January 26, 1920, reads:

> "Ten days after notice of this decision final judgment will be entered, and five days thereafter the record will be remanded to the court below." (R. 17.)

On January 26, 1920, the Attorney General, on behalf of the Collector of Internal Revenue, moved for a reconsideration (R. 19). This motion was denied on March 11, 1920, and the judgment entered on March 15,

1920 (R. 24). On March 16, 1920, the Attorney General, on behalf of the Collector of Internal Revenue, excepted to the decision of the court in denying the motion for a reconsideration and also to the final judgment entered therein, and notified the Insular Supreme Court that the Collector intended to petition the Supreme Court of the United States for a writ of certiorari and at the same time petitioned the Insular Supreme Court for the retention of the record in that court and a stay of the judgment pending the application for the writ (R. 25). The Insular Supreme Court on March 19, 1920, ordered the record retained under its jurisdiction for a period of six months (R. 25). Essentially the same proceedings in this regard were had in the other two instant cases.

As the judgments in these three cases fixed definite amounts, with interest, to be refunded to the respective tax payers, they were final within the meaning of Section 27 of the Act of August 29, 1916, for the purpose of review by certiorari, but that they were not final in the sense of *terminating* the litigations between the parties is evidenced by the fact that each of the cases is now being re-examined by this court with full authority to "revise, reverse, modify, or affirm" those judgments or either of them, all questions touching the power of the court so to dispose of the cases under Section 27 of the Act of August 29, 1916, and Section 5 of the Act of September 6, 1916, having been settled in granting the writs of certiorari.

CONSTITUTIONAL THEORY OF THE GOVERNMENT OF THE UNITED STATES, OF THE INDIVIDUAL STATES, AND OF THE PHILIPPINE ISLANDS.

Before proceeding further with the inquiry as to whether Congress possessed the power to ratify at that

time (June 5, 1920) the collection of the taxes imposed under Section 1614 of Act No. 2657, it might be well briefly to examine the constitutional theory of the Government of the United States, of the individual states as such, and of the Philippine Islands.

Congress, in enacting laws for the Philippine Islands, possesses and exercises all the attributes of sovereignty; whereas in enacting laws for the states, Congress possesses and exercises only that portion of sovereignty delegated to it. The validity of an Act of Congress depends upon whether the Constitution of the United States contains a grant of express or implied authority to enact it. State legislatures enact laws subject to the limitations imposed by the Federal and State constitutions. An Act of a State legislature is valid unless the Federal or State constitution expressly or impliedly prohibits its enactment. The Philippine Islands is neither a state nor an organized territory, although the form and organization of its government somewhat resembles that of both. The government of the Philippine Islands is a creation of the United States, acting through the President and Congress, both deriving power from the same source but from different parts thereof. For its powers and the limitations thereon the Government of the Philippines looked to the orders of the President before Congress acted and the Acts of Congress after Congress assumed control. Within the limits of its authority the Government of the Philippine Islands is a complete governmental organism with executive, legislative and judicial departments exercising the functions commonly assigned to such departments. The Philippine legislature enacts laws subject to the limitations of the Organic Laws of Congress. Such being the constitutional theory of the Government of the Philippine Islands it has been held (*United States* v. *Bull*, 15

Phil. Rep. 7; *Severino* v. *Governor-General*, 16 Phil. Rep. 366) that the courts in that country must consider the validity of an Act of the Philippine legislature as a State court considers the validity of an Act of the State legislature.

POWER OF STATE LEGISLATURES TO RATIFY AND MAKE VALID TAXES LEVIED OR LEVIED AND COLLECTED WITHOUT PRIOR AUTHORITY.

In *The Baltimore and Susquehanna Railroad Company* v. *Alexander Nesbit and Penelope D. Goodwin*, 51 U. S. 395, 401, the court said:

> "That there exists a general power in the state governments to enact retrospective or retroactive laws, is a point too well settled to admit of question at this day. The only limit upon this power in the states by the Federal Constitution, and therefore the only source of cognizance or control with respect to that power existing in this court, is the provision that these retrospective laws shall not be such as are technically *ex post facto*, or such as impair the obligation of contracts. Thus in the case of *Watson et al.* v. *Mercer*, 8 Pet., 110, the court say: 'It is clear, that this court has no right to pronounce an act of the State legislature void, as contrary to the Constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The Constitution of the United States does not prohibit the states from passing retrospective laws generally, but only *ex post facto* laws. Now it has been solemnly settled by this court, that the phrase *ex post facto* is not applicable to civil laws, but to penal and criminal laws.' For this position is cited the case of *Calder* v. *Bull*, already mentioned; of *Fletcher* v. *Peck*, 5 Cranch 138; *Ogden* v. *Saunders*, 12 Wheat., 266; and *Satterlee* v. *Matthewson*, 2 Pet., 380."

In *Thompson* v. *Lee County*, 70 U. S. 327, at an election held in Lee County, Iowa, in 1856, it was decided, or so said to be, that the County take stock and issue bonds to three different railroads. The validity of the subscription having been contested, the court, in December, 1856, held that the election was irregular, and conferred no power to issue the bonds. The legislature of the State accordingly passed a Curative Act, legalizing the proceedings and vote. Soon after the bonds were issued the county laid a tax to meet the interest due on the coupons. The legality of the tax was denied by some taxpayers of the county, but the court of last resort in the State having declared it lawful (*McMillen* v. *The County Judge*, 6 Iowa 391), the money was collected and the coupons paid for a short time. The court, however, subsequently reviewed and reversed its former decision; and the tax being no longer levied the coupons were no longer paid. A number of them being in the hands of Thompson, he brought suit in the Federal courts of Iowa to recover them. The court charged among other things "that the 'Curative Act,' of January, 1856, gave no validity to the bonds." The Supreme Court of the United States, after stating that the courts of Iowa having, when these bonds were issued, construed their constitution and laws so as to give them force and vitality, cannot, by a subsequent and contrary construction, destroy them, said at page 331:

> "But it is argued that when the county of Lee voted to take the stock for which these bonds were given, they attempted the exercise of a power which had not been delegated to them, or executed it so defectively, that their proceedings were without authority of law, and void.
>
> "It is not instructive to inquire into the different laws of Iowa under which this power is claimed to

exist, because the legislature of that State, on the 28th day of January, 1857, by an Act of confirmation, legalized the issue of these bonds."

In *United States* v. *Heinszen & Company, supra,* the court, at page 382, said:

"That where an agent, (and the Philippine Government is an agent of Congress) without precedent authority, has exercised in the name of a principal a power which the principal had the capacity to bestow, the principal may ratify and affirm the unauthorized Act, and thus retroactively give it validity when rights of third persons have not intervened, is so elementary as to need but statement. That the power of ratification as to matters within their authority may be exercised by Congress, state governments or municipal corporations, is also elementary."

In *Boardman* v. *Beckwith, et al.,* 18 Iowa, 292, the property in question was sold by the treasurer on the first Monday in October, 1860, for the delinquent taxes of 1858, and deed made October 20, 1863. There was no law in force authorizing the levy or collection of taxes for the year 1858, but taxes were in fact levied and collected for that year under the laws in force prior to 1858. A Curative Act was passed by the General Assembly on April 2, 1860. In passing upon the constitutionality of that Act, the court used this language (p. 294, 295):

"Whatever doubt there might be, if the Act of 1860 had taken effect after the sale and purchase under which the plaintiff claims, there can be no room for controversy when it is remembered that it was passed and took effect long prior to that time (this Act took effect May 9, 1860). That it is competent to thus legislate we entertain no doubt. The power of the legislature to pass acts of this character, conducive as they are to the general welfare, and based upon considerations of controlling public necessity,

is, in our opinion, undoubted. It does not interfere with vested rights, nor impair the obligation of any contract."

In *The Iowa Railroad Land Co.* v. *Soper et al.*, 39 Iowa 112, the plaintiff filed its petition on April 7, 1874, alleging that for the year 1871 the defendants levied upon all property judgment taxes in addition to the maximum levy allowed by law; that it paid said illegal and unauthorized taxes in January, 1872; and that the treasurer failed and refused to refund the amount thus paid. The Supreme Court of the State having held in June, 1873, in another case, that the county authorities had no power to levy the tax complained of, the General Assembly passed, on March 18, 1874, an Act ratifying and legalizing the imposition and collectoin of those taxes.

It was urged that the Act of March 18, 1874, was void because it was retrospective and impaired vested rights and without reasonable cause imposed upon third persons new duties in respect to past transactions. It was held (citing *Bennett* v. *Fisher*, 26 Iowa, 497) that there was nothing in the State constitution prohibiting in terms the enactment of retrospective laws, that such laws are valid, unless they violate some of the provisions of the National or State constitutions. The court cited with approval the case of *The State* v. *Squires*, 26 Iowa, 340, holding that retrospective laws, as distinguished from *ex post facto* laws, are not in conflict with the constitution of the United States, nor of the State of Iowa; that in the absence of any constitutional inhibition, a state legislature has the power to pass retrospective or retroactive laws, and that they will be declared inoperative only when they disturb or interfere with vested rights. The court then says that "we are unable to see wherein the Act (March 18, 1874) interferes with any vested rights," and again citing *The*

State v. *Squires, supra,* "nor is it material that a cause was pending, involving the question of the validity of the proceeding sought to be cured, when the act curing it was passed."

In *Grim* v. *Weissenburg School District,* 57 Pa. St. 433, the plaintiff under threat of distress and under protest paid the tax between the 10th and 15th of August, 1864, and on the 20th of the same month brought suit to recover back the amount thus paid. The Curative Act was passed on August 25, 1864. The court, in holding the Act constitutional, said, at page 435, among other things, that:

> "If an Act of Assembly be within the legitimate scope of legislative power, it is not a valid objection that it divests vested rights. There is no clause, either in the Constitution of the United States or of this Commonwealth, which prohibits retrospective laws. The legislature cannot impair the obligation of a contract, or pass an *ex post facto* law, for both these are expressly forbidden. But an *ex post facto* law is one which makes an act punishable in a manner in which it was not punishable when it was committed: *Fletcher* v. *Peck,* 6 Cranch 138. *Ex post facto* laws relate to penal and criminal proceedings, which impose punishments or forfeitures, and not to civil proceedings, which affect private rights retrospectively. Retrospective laws and state laws divesting vested rights, unless *ex post facto* or impairing the obligation of contracts, do not fall within the prohibition contained in the Constitution of the United States, however repugnant they may be to the principles of sound legislation: *Calder* v. *Bull,* 3 Dallas 386; *Satterlee* v. *Matthewson,* 2 Peters 413; *Watson* v. *Mercer,* 8 Peters 88."

A great number of other cases from state courts might be cited where this question is discussed and decided; and in nearly all of the well considered cases among them the

rule that state legislatures have the power to pass retrospective or retroactive laws, and that they will be declared inoperative only when they impair vested rights, is maintained. The same cases further hold that such laws, although retrospective and legalize taxes which were levied or levied and collected without any shadow of legal authority, and the levies were therefore utterly void, are nevertheless constitutional and operative, provided the legislature had the power to authorize the levy and collection of such taxes in the first instance and that no vested rights are thereby impaired. There are cases holding that retrospective statutes, attempting to cure the levying and collection of taxes for which there was no authority whatever, are unconstitutional because they are directed against vested rights of particular individuals or classes. This difference in the views of the state courts appears to rest very largely upon the scope and meaning of the term *"vested rights."*

As the exercise of judicial power is not within the constitutional authority of legislatures, that power being confided to the courts, if follows that when vested rights are divested by legislative acts of this character, they will be adjudged inoperative and void by the courts (*The Iowa Railroad Land Co.,* 39 Iowa 112, 123, *supra,* citing *Bagg's Appeal,* 7 Wright, (44 Pa. St.) 512. Legislative sentences cannot be legally imposed. Thus, in *Dash* v. *Van Kleeck,* 7 Johns. 477, cited in *The Iowa Railroad Land Co., supra,* the sheriff suffered a prisoner to escape by reason of which the sheriff became liable to the creditor. The prisoner returned to the custody of the sheriff, who, on going out of office, assigned him to his successor, and while in his custody the prisoner applied for his discharge under an Act for the relief of debtors, etc.; and the plaintiff, not knowing of the escape, opposed the application,

in consequence of which the debtor prisoner remained in custody. After the institution of the action against the sheriff who suffered the escape, an Act was passed by the legislature permitting sheriffs to plead the prisoner's return to custody as a defense to an action for an escape. It was held that this act did not operate retrospectively so as to divest the vested right of action which accrued to the plaintiff by the escape. The ground upon which the court based the decision is, that, as the sheriff, in suffering his prisoner to escape, became liable absolutely to the plaintiff for the debt, such liability was a vested right which could not be taken away by a retroactive law. That was a rested right of property which carried with it an equally vested right of action. Take away the right of action, and the property right would be worthless. But the legalizing of the imposition and collection of a tax, which but for the Curative Act was invalid and not capable of being enforced, does not impair any vested right of the tax-payer. The right of action which the tax-payer had, before the passage of the Curative Act, to recover back the illegal taxes paid is no more a vested right than in case he had not paid the taxes. He has just as good grounds for resisting payment, as, after payment, he could have to recover the money paid. Before taxes are assessed against the property of the tax-payer, in accordance with a statute for that purpose, he may lawfully claim the right to resist a claim made upon him for taxes not thus assessed. He has a right of action to enjoin the sale of his lands, or may replevy his personal property if seized for illegal taxes. But upon the regular levy of taxes in pursuance of a legislative enactment, his rights in this respect are changed. His right to resist the payment of the taxes is gone. The statute has created a liability to pay where none existed before its passage, and this is

so whether the act authorizing the tax levies be passed prior thereto or is an act legalizing a tax previously levied. In either case the power of the legislature to pass the law is the same. If it has no power to legalize a tax already levied without authority, it has no power to confer the authority in the first instance. If the right to resist payment of taxes assessed without authority of law is a vested right which cannot be taken away by any legislative act, then the legislature has no power to tax at all, for every statute which provides for taxing the persons or property of the citizens has the effect of creating liabilities where none existed before the passage of the statute. (*The Iowa Railroad Land Co.* v. *Soper, supra.*)

It is well settled by the state courts that the fact that the Curative Act was passed while a cause was pending, involving the legality of the proceeding sought to be cured, does not affect its validity. The power of the legislature is not dependent upon any circumstance of that character. It is just as competent for the legislative body to legislate upon the subject while an action is pending as before its commencement. No one can acquire a vested right by the mere act of bringing suit. A suit is only the assertion of an alleged existing legal right (Cooley on Constitutional Limitations, 7th Ed., p. 543). But what about the rights of a plaintiff who had obtained a final judgment for the refund of the amount of the taxes illegally paid, thereby disposing of the litigation before the passage of the Curative Act? Would such an act justify the custodian of the funds in declining to turn over the money notwithstanding the finality of the judgment, or, in case the judgment had been satisfied, could the particular plaintiff be again compelled to pay the same amount?

While it may not be necessary to attempt to answer these questions for the reason that the judgments in the

cases at bar were not *final* at the time the Congressional Curative Act was passed, yet a few observations might be helpful. Referring again to the case of *The Iowa Railroad Land Company* v. *Soper, et al., supra,* it will be remembered that the illegal and unauthorized taxes were paid in January, 1872, while the Curative Act was not passed until 1874. The first section of that act reads as follows:

> "Section 1. *Be it enacted by the General Assembly of the State of Iowa,* That such judgment taxes, so levied by such corporations, be, and the same are hereby declared legal and valid, and where the same have not been paid, the officers of such corporations are hereby empowered and directed to proceed at once to collect the same as other taxes are collected, and pay the same over to the parties entitled thereto."

The levy of the taxes was legalized and validated, and where the same had not been paid, the officers were empowered and directed to proceed at once with the collection. The entire assessment was ratified and every tax-payer was thereby made liable for the payment of the tax theretofore assessed against him. On the date of the passage of the Curative Act the individual status of the hereinafter mentioned farmers and tax-payers living in the same community, with respect to the taxes, was, let us say, as follows: A had already paid his taxes without protest; B, C and D had paid their taxes under protest, each instituting on the same day an action to recover the taxes thus illegally imposed and collected. B's suit had reached final judgment which had been satisfied by refunding the amount paid. C's action had also reached a final judgment disposing of the litigation between the parties, but the judgment had not been satisfied by refunding the amount of the taxes. D's action was still in

process of adjudication; E had not paid his taxes; and F paid his taxes under protest, and subsequent to the passage of the Curative Act, instituted an action to recover back the amount thus paid. What is the difference between the rights and liabilities of these various tax-payers in respect to the judgment taxes? The judgment taxes were levied upon all the taxable property in the county for the purpose of paying certain judgments rendered against the county prior thereto, founded upon the ordinary warrants of the county issued for the ordinary expenses thereof. Thus, all the tax-payers received a like and equal benefit, and must carry a like and equal burden unless some intervening event brings about such a change in the situation of the parties as to relieve one or more from paying his share of the common burden by reason of having acquired certain vested rights. A has no rights which he could successfully assert because he did not pay under protest, protest being necessary to the maintenance of an action to recover. The pending action of D could not relieve him from the payment of the ratified tax. The officers were directed to proceed at once to collect the taxes assessed against E. F occupies exactly the same position as that occupied by the Iowa Railroad Land Company in the case against Soper et al. We have been unable to find where the cases of B and C have been specifically dealt with by the highest court of any state. The others have been definitely settled. Should B and C escape all liability because they happened to be a little more active or encountered more favorable circumstances in the prosecution of their actions for a refund? Plain and simple justice answers the question in the negative. According to the very nature of things, neither B nor C could have acquired a vested right which the Constitution protects.

THE POWER OF CONGRESS TO RATIFY AND MAKE VALID TAXES LEVIED AND COLLECTED WITHOUT PRIOR AUTHORITY. CONSTITUTIONALITY OF THE ACT OF JUNE 5, 1920, *SUPRA*.

The argument for the unconstitutionality of the Act of June 5, 1920, was placed by counsel for respondents in opposing the applications for writs of certiorari upon the ground that at the time of its passage each of the respondents had a vested right to recover back from the petitioner as Collector of Internal Revenue the money which it had been compelled to pay without authority of law and that this vested right the Congress could not divest, the vested right of each being the judgment entered by the Insular Supreme Court at the time heretofore stated. The argument proceeded along the lines that Congress, in legislating for the Philippine Islands, is subject to those "fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments" such as that imbedded in the Fifth Amendment wherein it is declared that "No person shall be deprived of life, liberty, or property without due process of law," and that the judgment in each of the cases being absolutely final, it was therefore property within the meaning of that amendment.

An extended argument of the questions whether a final judgment is a contract and whether the Act of June 5, 1920, impairs the obligation of that contract is wholly unnecessary (a) because the judgments were not final, as we will attempt to show later, and (b) because the inhibition against the exercise of such a power which is contained in Section 10, Article I of the Federal Constitu-

tion, is not addressed to Congress but to the legislatures of the several states.

Again, with respect to retrospective or retroactive laws, it is sufficient to observe that Congress is not prohibited from passing such laws, and that the Act of June 5, 1920, is not an *ex post facto* law.

It was strongly urged by counsel for respondents in his brief opposing the granting of the writs in these cases that Congress cannot deprive, by legislative enactment, any person in the Philippine Islands of his property without due process. A number of well considered cases were cited in support of this proposition. *We find it unnecessary, if we were so disposed, to press a contrary view for the reason that the Act of June 5, 1920, falls short of taking the property of the respondents without compensation or due process of law.* While there is no express or implied limitation in the Constitution and its amendments on the power of Congress in legislating for the Philippine Islands, by which that body is restrained from the widest latitude of discretion, "it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended" (*Downes* v. *Bidwell*, 182 U. S. 244).

THE JUDGMENTS UNDER REVIEW WERE NOT PROPERTY, IF IT BE ADMITTED THAT THEY WERE FINAL ON JUNE 5, 1920.

Considered as an original proposition, the weight of reason and justice sustain the view that the judgments in question, if it be admitted that they were final at the time of the passage of the Curative Act, were not property within the meaning of the Fifth Amendment to the Constitution of the United States.

We assume that no one will now contend that the Congress of the United States was without power to bestow upon the legislature of the Philippine Islands authority to enact Section 1614 of Act No. 2657 and to collect the taxes imposed therein, whether or not such taxes or any part thereof were in fact duties on exports.

Upon the question of vested rights in judgments, counsel cites the general rule laid down in 6 R. C. L., p. 319, to the effect that "A judgment is a vested right of property that the legislature cannot, by a retroactive law, either destroy or diminish its value in any respect." *Merchants Bank* v. *Ballou,* 98 Va. 112, 32 S. E. 481, and *Strafford* v. *Sharon,* 61 Vt. 126, 17 Atl. 793. The first case here cited in support of the general rule just quoted had to do with trust deeds on real estate to secure creditors, and in the second case it was held "that, as the proceeding under the Act of 1882 had become in legal effect a judgment *inter partes* while that act remained as to that proceeding in full force, the vested right acquired under that judgment could not constitutoinally be repealed or affected or a new remedy by proceedings *de novo* substituted by the Act of 1886" (Quotation from Syllabus). It is true that a final judgment cannot be disturbed by a curative act of a state legislature if such an act impairs the obligation of a contract (*McGahey* v. *Virginia,* 135 U. S. 662, 685) Any act of the legislature, which is retrospective in its operation, that takes away from some their vested rights, and gives them to others, that changes the nature of obligations, and dispenses with liabilities under which all others would lie in a similar situation, or that is partial in its operation, giving one individual privileges that are not extended to others, contrary to the general law, is not a "law of the land," within the meaning of the Constitution, and is therefore void (*Officer* v. *Young* (1833) 13

Tenn. (5 Yerg.) 320). While certain final judgments are vested rights of property which cannot be taken away by legislative enactments, there are other final judgments which do not carry with them such vested rights. For example, in the case of *Morley* v. *Railway Co.*, 146 U. S. 162, a judgment had been obtained, which, under existing laws, bore interest at a given rate. After its rendition the legislature reduced the rate of interest on judgments, doing so in language which made the act applicable to judgments that had been recovered before the act was passed. It was held that this law neither impaired the obligation of a contract nor deprived judgment creditors of their property without due process of law. There is another line of decisions holding that rights acquired in virtue of existing laws, and claimed to be vested, were not so far vested as to become property within the meaning of the Federal Constitution, and to be for that reason beyond the reach of legislative action. *Evans-Snider-Buel Co., et al.* v. *McFadden et al.*, 105 Fed. 293, affirmed by the Supreme Court of the United States, 185 U. S. 505, and cases cited therein. Hence, the nature and character of the cause of action upon which the final judgment rests determine whether the judgment is such a vested right of property as is protected by the Constitution. Again, the nature and character of a cause of action determine whether or not it is property and is therefore protected by the Supreme law of the land.

We have no criticism to offer against the conclusions reached by this court in *Choate* v. *Trapp*, 224 U. S. 665, and *Wood* v. *Love County*, decided April 26, 1920, U. S. Adv. Ops. 1919-1920, p. 492.

In those cases it was decided that "the exemption was a vested property right arising out of a law of Congress and protected by the Constitution of the United States." This

is true because the "law of Congress" was an essential part of the contracts or patents. The "allotments" could not be taxed during the stated period without impairing the obligations in those contracts. The respondents can get no comfort out of the holdings in these cases.

A clear understanding of the causes of action of the respondents will aid in determining the kind and character of their rights which they are seeking to enforce. The respondents were merchants within the meaning of Section 1614 of Act No. 2657. They were residents of and were authorized to do business in the Philippine Islands. They received the same protection and were entitled to the same rights as any other like residents of that country. They were familiar with the local law governing the percentage tax on merchants' sales. They knew that Section 1614 required them to pay that tax on the gross value in money of the merchandise sold or "consigned abroad by them," and this important fact was taken into consideration at the time the prices of such merchandise were fixed, the amount of the tax being added to the selling price. The Philippine Government called upon them to pay those taxes and they paid them under protest because the taxes were levied and collected, let us say, without authority. They instituted these actions to recover back the money thus paid. The right to commence the suits was given them by statute. They prosecuted their cases to final judgment in the sense heretofore stated, which directed that the money be returned to them, but before the entry of final judgments disposing of the litigation between the parties, Congress created the liability by making legal the levy and collection of the taxes in question. That liability fell upon all of the same class alike and the burden should be borne by all alike. The creation of that liability was in the interest of the general

welfare and was based upon consideration of controlling public necessity. The creation of such a liability based upon those considerations could not and did not impair the obligations of any contract, nor interefere with vested rights, nor result in the taking of private property without due process of law. These actions do not rest upon contractual obligations between private individuals but now upon an obligation of a citizen to his government which affords him protection for his life, liberty, and property. There is a broad and clear distinction between vested rights in real and personal property which arise out of contractual relations between the parties, or by lapse of time, and adverse possession acting upon the title and the *right* to institute and maintain an action to recover back taxes levied and collected without prior authority or even recover such taxes on a final judgment after the passage of the Curative Act. When called upon to resolve questions like those involved in the cases at bar, courts should never close their eyes to the equities of the case, but should permit their judgments to be influenced by the considerations that that which the legislature has done in the way of disturbing rights acquired under existing laws was morally right and in accordance with justice and fair dealing (*Evans-Snider-Buel Co.* v. *McFadden, supra*). The respondents in the instant cases added to the price of their merchandise the amount of the percentage taxes which they paid to the Government. They received valuable consideration in the way of protection for the money which they had paid out in taxes. Many other merchants paid the same kind of taxes but they are not seeking recovery. The rights and obligations of all being the same, no legal or moral grounds can exist for treating them differently. Furthermore, as the taxes imposed in Section 1614 of Act 2657 were *legalized* and *ratified* by the Act

of June 5, 1920, there would be no need of refunding to the respondents the taxes paid under that section as they could be required to return the same amount to the Government as *back-taxes*. The result is that the respondents could acquire no vested rights even under final judgments.

THE JUDGMENTS WERE NOT FINAL ON JUNE 5, 1920.

As we have heretofore stated, the judgments under review having fixed definite amounts to be refunded to the respondents, they were final for purposes of review by certiorari but not final in the sense of terminating the litigation between the parties. No argument other than the plain fact that we are still contesting the claims of the respondents for a refund of the taxes is required to establish this proposition. "No judgment is final which does not terminate the litigation between the parties to the suit" (*St. Clair County* v. *Lovingston*, 85 U. S. 628). Generally speaking, a right of action is property in a qualified sense, but no one can claim a vested right until recovery has been finally adjudged. Before such final adjudication, all is contingent. No one is certain of the result. The right of action of the respondents is not even property in a qualified sense, because they have been made liable for the taxes.

THE CASE OF *UNITED STATES* v. *HEINSZEN & CO., SUPRA*, IS DIRECTLY IN POINT AND SETTLES THE QUESTION OF THE POWER OF CONGRESS TO RATIFY THE COLLECTION OF THE TAXES IN QUESTION.

The case of *United States* v. *Heinszen & Co., supra*, was instituted to recover back the amount of tariff duties

illegally exacted in the Philippine Islands on merchandise entering that country from the United States. That action was pending in the Court of Claims when the Curative Act was passed. It was held that Congress had the power to pass the ratifying act and that that act barred the Company's right to recover. In the instant cases, the Curative Act was passed before final judgments were entered. It seems to us that there is absolutely no grounds for distinction between that case and the three cases at bar.

1. Counsel for respondents, at page 14 of his brief opposing the applications for writs of certiorari, in attempting to distinguish the Heinszen case, says:

> "The military tariff of 1898 was superseded by a Philippine tariff act approved by Congress in the Act of March 8, 1902. The ratification of the military tariff applied, by its terms, to 'the tariff duties—imposed—prior to March 8, 1902.' The duties involved in the Heinszen case were collected after the Treaty of Paris and before March 8, 1902. It was not suggested, and could not have been contended, that the ratification of the military tariff could have validated any collections made ostensibly under its authority after its repeal.
>
> "In the present case the judgment covers export duties collected under the pretended authority of Section 1614 of Act 2657 and after August 29, 1916, when so much of said section as authorized export duties was repealed by Section 11 of the Jones Law. If there were involved herein any export duties collected under Section 1614 before the repeal these would be covered by the terms of the ratification of 1920, which certainly can apply to the provisions ratified only so long as they remain in existence."

Or, in other words, counsel contended that where an agent, without precedent authority, has exercised in the name of a principal a power which the principal had the

capacity to bestow and that where the principal had ratified and confirmed the unauthorized acts and expressly directed the agent to abstain from further exercise of such power, the agent continues to do so, the principal was thereby divested of the right and power to ratify and affirm those subsequent acts and thus retroactively give them validity even though no rights of third persons had intervened.

That the mere fact that the agent fails to obey the orders of his principal in this respect does not divest the principal of his right and power to ratify and affirm the unauthorized acts of the agent is so elementary as to need but statement.

If it be conceded that Section 11 of the Act of August 29, 1916, repealed so much of Section 1614 of Act No. 2657 as imposed the percentage tax on the money value of the merchandise sold or consigned abroad, such a repeal could not affect the right or power of Congress to legalize the taxes imposed under that part of the section and to ratify and confirm the subsequent collection of the same. But it is said that in the Heinszen case, *supra*, Congress ratified unauthorized acts only, while in the instant cases an attempt was made to ratify acts which Congress itself had expressly prohibited. This, at most, is a distinction without a difference in so far as the right or power of Congress to act is concerned. If Congress had the power to prohibit the imposition and collection of the taxes, it has the power to withdraw its objection and ratify the collection of the taxes. The acts of officials in levying and collecting taxes without authority are prohibited and may be enjoined at the instance of the taxpayer. The same acts, if carried out in the face of an express prohibition, are likewise prohibited and the taxes may be recovered in a suit at law. In each instance the

acts are *malum prohibitum* and not *malum in se*. At no time would there be an inherent want of power in Congress to act in the premises.

2. Counsel also urged that, while the Heinszen case holds that a Congressional ratification may destroy a mere right of action, yet the reasoning, by distinction, compels the conclusion that a claim reduced to judgment is immune.

We think the reasoning of the case compels the contrary conclusion and sustains our contention that final judgments in cases such as the three cases at bar are not such vested rights of property that the legislature cannot, by retroactive law, diminish or destroy their value.

In considering the proposition relied upon to the effect that the right to recover the money could not be taken away without violating the Fifth Amendment to the Constitution of the United States the court said:

> "* * *, the argument disregards the fact that when duties were illegally exacted in the name of the United States Congress possessed the power to have authorized their imposition in the mode in which they were enforced, and hence from the very moment of collection a right in Congress to ratify the transaction, if it saw fit to do so, was engendered. In other words, as a necessary result of the power to ratify, it followed that the right to recover the duties in question was subject to the exercise by Congress of its undoubted power to ratify. To hold to the contrary would be to say that whilst the unauthorized act of an officer done on behalf of the United States was subject to ratification by the United States, yet if the officer acted without authority the act when performed annihilated the power to ratify; that is, that the very condition which engendered the power destroyed it.
>
> "But if it be conceded that the claim to a return of the moneys paid in discharge of the exacted duties

was in a sense a vested right, it in principle, as we have already observed, would be but the character of right referred to by Kent in his Commentaries, where, in treating of the validity of statutes retroactively operating on certain classes of rights, it is said (Vol. 2, pp. 415, 416): 'The legal rights affected in those cases by the statutes were deemed to have been vested subject to the equity existing against them, and which the statutes recognized and enforced.' * * *.

"* * * Hence again if it be conceded that the capacity to prosecute the pending suit to judgment was in a sense a vested right, certainly also the power of the United States to ratify was, to say the least, a right of as high a character. To arrogate to themselves the authority to divest the right of the United States to ratify is then in reason the assumption upon which the asserted right of the claimants to recover must rest." (p. 386, 387).

It being settled beyond question that Congress had the power to authorize the Philippine Government to levy and collect the taxes in question, it necessarily follows that from the moment of collection "a right in Congress to ratify the transaction, if it saw fit to do so, was engendered." The rights of the respondents arising out of the judgments were certainly of no higher order than the right of Congress to ratify the collections. We understand that the respondents do not claim that their alertness in prosecuting their actions divested the right of Congress to ratify but only divested the power of Congress to make that ratification effective as to them. Then the authority to divest that power of Congress is the basis of the right of the respondents to recover or to be liable for the taxes if their judgments had been satisfied before the passage of the ratification act. The Heinszen case is authority for holding that the powers of Congress in matters of taxation cannot be diminished in that man-

ner. No question touching the rights of individuals arising out of contractual relations is here involved.

3. It was further urged that in the Heinszen case the suit was against the United States, while in the instant cases the suits are "against James J. Rafferty and they involve only the liability of the Collector. The distinction is quite clear between an Act of Congress denying the liability of the United States and an act which pretends to relieve one individual from his judgment debt to another."

Does counsel mean that Rafferty is the judgment debtor and that the Philippine Government will not be affected in one way or the other, regardless of the final action of this court? Certainly not. Rafferty is not now collector, and the taxes collected by him from the respondents has long since been turned over to the Philippine Government. These suits are for all intents and purposes actions against the Philippine Government, brought by the respondents with the consent of that government (Section 1721 of Act No. 2657 and Section 1579 of Act No. 2711). The judgments, if not reversed, will have to be satisfied by the Philippine Government and not by the collector out of his personal funds. It is apparent that any further argument upon this proposition is unnecessary.

DID CONGRESS INTEND TO RATIFY THE TAXES IN QUESTION?

Counsel says:

> "It is now proposed to demonstrate conclusively that Congress never intended by this Act of June 5, 1920, to ratify any of the taxes here in dispute, namely, any of those collected between September 30, 1916, and October 1, 1917, but did intend to

ratify those taxes collected under authority of the same section of the Administrative Code of 1916, between July 1, 1916, the date the Code became effective, and August 29, 1916, the date the Jones Law became effective" (page 17 of brief opposing applications for writs of certiorari).

The argument in support of this proposition disregards the plain language of the Act of June 5, 1920, wherein Congress, after legalizing and ratifying the taxes imposed by the Philippine Legislature in Section 1614 of Act No. 2657, declared that the "collection of *all* such taxes made under or by authority of such Act of the Philippine Legislature is legalized, ratified, and confirmed * * *." Thus, the taxes were legalized and the collection of *all* such taxes was ratified. The word "all" is all-inclusive, and when given its ordinary meaning no taxes levied and collected under that section can be excluded from the operation of the Curative Act. Section 1614 was effective from July 1, 1916, to October 1, 1917, a period of 15 months, during which time large amounts of taxes were collected on the transactions involving sales and consignments of merchandise abroad. Can the ratification of the collection of *all* the taxes mean only those collected between July 1st and August 29th, 1916,—a period of a little less than two months? The mere asking of this question suggests the answer. If any other evidence were needed to show that Congress intended to ratify the collection of *all* the taxes and not just a small part thereof, it may be found in the "Hearing before the Sub-Committee of the House Committee on Appropriations in charge of the deficiency appropriations for the fiscal year 1920 and prior fiscal years, Sixty-sixth Congress, second session, pages 152-162."

PRINCIPLES AND RULES WHICH SHOULD GOVERN COURTS IN EXERCISING THEIR POWER OF ANNULLING ACTS OF THE LAW-MAKING DEPARTMENT OF THE GOVERNMENT.

That this court possesses the power to declare the Curative Act of June 5, 1920, *supra,* unconstitutional, is not denied; and no other power possessed by it is to be more cautiously and considerately exercised. The power of courts to interpret and construe laws, does not carry with it the power to annul them. Courts in the exercise of their power of interpretation are not authorized to disregard the plain language of a law, and by construction to bring it within constitutional restrictions which defeat its purpose. Neither are courts authorized to make, by constructon, the constitutional restrictions applicable to laws which are not within the plain language of that instrument. The uniform doctrine announced in various words of the courts is that a law will not be declared unconstitutional and void, unless it clearly and palpably conflicts with the Constitution; and of this there must be no doubt in the mind of the judge or judges. (See *Fletcher* v. *Peck,* 6 Cranch 37; *Cooper* v. *Telfair,* 4 Dallas 14; *Ogden* v. *Saunders,* 12 Wheaton 270; *The State* v. *Cooper,* 5 Blackford 259; *Wellington et al., Petitioners,* 16 Pick 95).

CONCLUSION.

The petitioner here, defendant below, as Collector of Internal Revenue for the Philippine Government, stands upon the propositions (a) that the taxes in question were not duties on exports but a percentage tax on *transactions* involving sales and consignments of merchandise abroad;

(b) that the collection of those taxes was ratified and confirmed by the Act of June 4, 1918; (c) that the collection of those taxes was ratified and confirmed by the Act of June 5, 1920; and that there is no authority in law for the rendition of judgments against the petitioner for interest and costs. The judgments under review should therefore be reversed in their entirety.

Respectfully submitted,

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Major, Judge Advocate.

atty for Petitioner

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Dates	Philippine Laws	Acts of Congress	Facts
1914 July 1	Act No. 2339, "The Internal Revenue Law of 1914." Sec. 40 imposes a tax of 1/3% on merchants' sales. Sec. 41 exempts exports.	(This Act has not been ratified by Congress)	
1915	Acts No. 2432 and 2445 effective for the year 1915, amend Sec. 40 of Act 2339 by increasing tax to 1%. The exemption of exports is left in force.	(see Mch. 4, 1915 infra)	
Mch. 4		Act of Congress of March 4, 1915, ratifies the internal revenue taxes imposed by Acts 2432 and 2445. (38 Stat. L. 1143)	
1916	Act No. 2541, effective for the years 1916 and 1917, by amendment of Sec 40 of Act 2339 continues the 1% tax on merchants' sales, and by amendment of Sec. 41 of Act 2339 repeals the exemption of exports.	(see July 1, 1916, infra)	

TABLE SHOWING CHRONOLOGICAL RELATION OF PHILIPPINE LAWS, ACTS OF CONGRESS, AND FACTS OF THIS CAUSE—(Continued)

Dates	Philippine Laws	Acts of Congress	Facts
	Act. No. 2622, amending Act 2541, extends the 1% tax to "consignments."	(see July 1, 1916, infra)	
July 1		Act of Congress of July 1, 1916, ratifies the internal revenue taxes imposed by Acts 2541 and 2622. (39 Stat. L. 286)	
July 1	Act No. 2657, "Administrative Code of 1916," repeals Acts above mentioned and (Sec. 1614) imposes a tax of 1% on merchants' sales and consignments abroad; does not exempt exports. This Code took effect July 1, 1916.	(see June 5, 1920, infra)	
Aug. 29		Act of Congress of Aug. 29, 1916, "Autonomy Act," Sec 11: "no export duties shall be levied or collected on exports from the Philippine Islands."	
Oct. 1			Exports involved in this cause begin. (First cause of action, pp. 2-4 of Record).

TABLE SHOWING CHRONOLOGICAL RELATION OF PHILIPPINE LAWS, ACTS OF CONGRESS, AND FACTS OF THIS CAUSE—(Continued)

Dates	Philippine Laws	Acts of Congress	Facts
1917			
Jan. 18			Protested payment of tax on exports of last quarter of 1916. (First cause of action, p. 3 of Record.)
Apr. 19			Protested payment of tax on exports of first quarter of 1917. (Second cause of action, p. 5 of Record.)
July 19			Protested payment of tax on exports on second quarter of 1917. (Third cause of action, p. 6 of Record.)
Oct. 1	Act No. 2711, "Administrative Code of 1917" effective Oct. 1, 1917, supersedes Act 2657; reimposes (Sec. 1459) the tax of 1% on merchants' sales and consignments abroad, without exempting exports. Sec. 1459 is still in force.	(see June 4, 1918, infra)	
Oct. 1			End of period of exports affected by Act 2657, (first four causes of action) and beginning of period of exports affected by Act 2711. (Fifth cause of action.)

TABLE SHOWING CHRONOLOGICAL RELATION OF PHILIPPINE LAWS, ACTS OF CONGRESS, AND FACTS OF THIS CAUSE—(Continued)

Dates	Philippine Laws	Acts of Congress	Facts
Oct. 19			Protested payment of tax on exports of third quarter of 1917. (Fourth cause of action, p. 8 of Record.)
Dec. 31			Close of period of exports involved in this cause. (Fifth cause of action, pp. 9-10 of Record.)
1918			
Jan. 18			Protested payment of tax on exports of fourth quarter of 1917. (Fifth cause of action, p. 9 of Record.)
Feb. 7			This action begun by filing complaint. (p. 1 of Record).
June 4		Act of Congress of June 4, 1918 ratifies the taxes imposed by Sec. 1459 of Act 2711. (40 Stat. L. 597)	
July 25			Judgment of Court of First Instance, (pp. 12-17 of Record).
1920			
Mch. 15			Judgment of Supreme Court of Philippine Islands, (pp. 48-50 of Record).
June 5		Act of Congress of June 5, 1920, ratifies taxes imposed by Sec. 1614 of Act 2657. (41 Stat. L. 1025)	

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921

No. 138

JAMES J. RAFFERTY, Collector of Internal Revenue for the Philippine Islands, *Petitioner,*

vs.

SMITH, BELL & COMPANY, LIMITED, *Respondent.*

BRIEF FOR RESPONDENT

"Preliminary Observation"

This action was commenced and prosecuted against James J. Rafferty in his personal capacity—not against the Philippine Government nor against its Collector of Internal Revenue as such. Therefore, respondent has not agreed, and does not agree, to the substitution suggested by petitioner in the first paragraph of his brief.

Statement of the Case

To petitioner's statement respondent would add the fact, stated at page 9 of petitioner's brief, that the merchandise upon whose value the disputed taxes were assessed, was "sold and exported from the Philippine Islands." This is the allegation of the complaint, admitted by the answer. (Record, pp. 2-9, 12.)

It, therefore, was not an issue in the case when it was tried. It must be admitted here, as it has been in all proceedings heretofore had, that the merchandise upon which the taxes were assessed, was exported from the Philippines.

ARGUMENT

I

The Transactions Involved Were Exports

Petitioner argues that shipments from the Philippine Islands to the United States are not "exports from the Philippine Islands," within the meaning of sec. 11 of the Autonomy Act, which prohibits the levy and collection of duties on such exports. This contention, if sound, would lead to the amazing conclusion that Congress permitted the imposition of a burden on trade with the United States which was forbidden to be laid upon trade with foreign countries.

But, whatever may be the merit of the argument, it has no application to this case. Petitioner, briefing three cases together, has failed to make clear the difference, conceded at page 9 of his brief, which in this respect distinguishes this case from the others. It is alleged herein that the merchandise was "exported from the Philippine Islands," and the answer admits that this allegation is true. (Record, pp. 2-9, 12.)

The tax of sec. 1614 of Act 2657, in so far as it falls upon export sales, is an export duty.

The percentage tax on merchants' sales is called a "privilege tax on business or occupation" (Act 2657, sec. 1593), and it is urged that a tax imposed upon the privilege of selling merchandise, even in so far as it is measured by the gross price of export sales, is not a duty on exports. This argument has been discredited since *Brown* v. *Maryland*, 12 Wheat. 419. In that case it was decided that a statute requiring importers to pay a license tax for the privilege of selling their imports did, in effect, impose an import duty. By way of illustration Chief Justice Marshall says (p. 445):

> "Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax as Congress might think proper to impose; would Government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the Constitution would expose it, by saying, that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations?"

If a license tax of fixed amount, such as was condemned in *Brown* v. *Maryland*, on the occupation of an exporter is within the prohibition of duties on exports, even less defensible is a tax on such occupation which is directly proportioned to the volume of the business of exporting. In its effect upon the export business of respondent, the tax of sec. 1614 is exactly the same as if an export duty of 1% were frankly levied. Constitutional limitations may not be evaded by indirection, and the validity of a statute is to be determined by its effect, not by its form. *Cummings* v. *Missouri*, 4 Wall. 325; *Henderson* v. *Wickham*, 92 U. S. 259; *Fairbank* v. *United States*,

181 U. S. 283; *Bailey* v. *Alabama*, 219 U. S. 219.

A stamp tax on export bills of lading is an export duty. *Fairbank* v. *United States, supra.* But it would be merely tedious to cite further authorities and to argue the principle at length, for this court has recently passed upon the exact question in a case which, despite petitioner's opinion to the contrary, seems to us indistinguishable. *Crew Levick Co.* v. *Commonwealth*, 245 U. S. 360.

Attention is directed to an important feature of this point raised by petitioner, a feature that appertains to his immediately succeeding point. Neither was raised in the courts below; both are here urged for the first time. This Court holds that points available when the case was presented to the Philippine Supreme Court and not there urged, will not be considered upon review here. *De la Rama* v. *De la Rama*, 241 U. S. 154.

Neither of these points, therefore, is properly before this court, but as they can be very easily answered, respondent presents the plain arguments against them.

II

The taxes in question were not legalized by the Act of Congress of July 1, 1916.

The judgment under review affects taxes levied and collected under the ostensible authority of sec. 1614 of Act 2657; no others are involved in this case. Act 2657 was approved February 24, 1916, took effect July 1, 1916, and was superseded by Act 2711 October 1, 1917. The percentage tax on sales immediately before July 1, 1916, was found in Acts 2541 and 2622, which took effect January 1, 1916. By a provision inserted in an appropriation Act of July 1, 1916 (39 Stat. L. 286), Congress ratified the internal revenue taxes imposed by Acts 2541 and

2622. It is now contended that this ratification affords sanction for the taxes imposed by Act 2657.

The argument is best answered by quoting the ratification of 1916:

> "That the internal revenue taxes imposed by the Philippine Legislature under the law enacted by that body on December twenty-first, nineteen hundred and fifteen (No. 2541), as amended by the law enacted by that body on February 4, 1916 (No. 2622) * * * are hereby legalized and ratified, and the collection of all such taxes heretofore or hereafter is hereby legalized, ratified and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

Bearing in mind that Act 2657, expressly repealing and superseding Acts 2541 and 2622, had been on the statute books for more than four months and took effect the very day that Congress acted, it requires hardihood to assert that Congress intended to include Act 2657 by specifying Acts 2541 and 2622. "When terms are unambiguous we may not speculate on probabilities of intention." *Insurance Co.* v. *Ritchie*, 5 Wall. 541, 545.

Even if the intention of Congress were open to inquiry, every apparent reason must impel the restrictive interpretation. This court in *Lincoln* v. *United States*, 197 U. S. 419 and 202 U. S. 484, and in *United States* v. *Heinszen & Co.*, 206 U. S. 370, had clearly marked the difference in effect between a specific and a general ratification. Congress had abolished Phillippine export duties by Act of October 3, 1913, (38 Stat. L. 193), and forbade that method of taxation in the Autonomy Act of Aug. 29, 1916. It may well be supposed that the ratification of July 1, 1916, (in so far as it affected export duties), was conceded only by way of exception to the general policy of Congress and only because the statutes validated by the ratification were already

superseded. To condone a temporary excess of authority in the past was one thing; to grant increased authority for future exercise was quite another.

Since 1902 Philippine import and export duties have been prescribed by Congress, and the invasion of this reserved function by various so-called internal revenue laws of the Philippine Legislature had led to a series of curative acts in which Congress has invariably employed the formula of specific ratification. 35 Stat. L. 615; 38 Stat. L. 1143; 39 Stat. L. 286; 40 Stat. L. 597; 41 Stat. L. 1025. As each Philippine statute took effect, whether we call it the re-enactment of an old law or the enactment of a new, it became the collector's authority to the exclusion of its predecessor, and Congress in every instance restricted its ratification to the taxes imposed "under" or "in" a specified act, and to the collection of "such taxes." If Congress by the Act of July 1, 1916, had authorized the re-enactment of provisions similar to those specifically ratified, why the superfluous ratifications of 1918 and 1920? And if in 1918 and 1920 Congress was actuated, not by an appreciation of necessity, but merely by a purpose to dispel doubts, why the consistent adherence to the formula of specific ratification?

The taxes in question were not legalized by the Act of Congress of June 4, 1918.

The taxes affected by the judgment herein were levied and collected under the ostensible authority of Act 2657, after the prohibition of export duties by sec. 11 of the Autonomy Act, and while that prohibition stood unimpaired. Act 2657 was superseded October 1, 1917, by Act. 2711, under whose ostensible authority similar taxes were thereafter levied and collected. By a provision of the appropriation act of June 4, 1918 (40 Stat. L. 597), Congress ratified the taxes imposed by Act 2711. Petitioner

argues that this ratification legalized the taxes imposed by Act *2657*.

Again the language of Congress affords the conclusive answer:

> "The taxes imposed by the Philippine Legislature in section fourteen hundred and fifty-nine of the act numbered twenty-seven hundred and eleven, enacted by that body on March tenth, nineteen hundred and seventeen, are hereby legalized and ratified, and the collection of all such taxes heretofore or hereafter is legalized, ratified and confirmed hereby as fully to all intents and purposes as if the same by prior Act of Congress specifically had been authorized and directed."

What has been said above of the ratification of 1916 is applicable to this Act of 1918. If possible, the reasons for the strict interpretation of the later enactment are more convincing. There is not only the presumption that Congress was advised of Act *2657*, but the research of petitioner (brief, p. *27*) shows that the situation was fully explained by the Governor-General, through the Secretary of War. Congress was advised that the Philippine Government had collected in defiance of Congress about $2,000,000 of export duties under Act *2657* and desired the sanction of Congress for the retention of such collections. The response in the form of a ratification limited to taxes "imposed in section 1459 of the act numbered 2711," is as clear a denial of the appeal of the Governor-General as could be framed. There is no repeal of sec. 11 of the Autonomy Act, and the evident purpose is to grant a limited exception rather than to abandon the principle of the prohibition of export duties. Congress may have been disposed to grant relief from the time when the Philippine Government, by the Governor-General's letter, evidenced a law-abiding sentiment; this must have been, as

petitioner shows, about October 1, 1917, which was moreover a convenient starting-point. But Congress must have been reluctant to stultify wholly the prohibition of export duties of the Autonomy Act, and wholly to condone the impudent disregard of the effect of that prohibition upon sec. 1614 of Act 2657.

III

The recital in the judgment under review, that sec. 1459 of Act 2711 repealed sec. 1614 of Act 2657, if error at all, is immaterial.

Justice Johnson was inaccurate in saying that sec. 1614 of Act 2657 was *expressly* repealed, but the context (quoted only in part by petitioner) shows that the Justice fully understood, and adequately stated, the relation of the two statutes. The verbal mistake has no influence or effect upon the conclusions stated.

Act 2711 purports to be an amendment of Act 2657 and contains no explicit repeal of the latter. It provides that "said Act (2657) shall hereafter read as follows," and continues to the length of twelve hundred printed pages. To say that Act 2711 supersedes, without repealing, Act 2657, is merely to quibble.

Whatever the effect for other purposes of the form employed in revising the administrative law, we have the fact that the Collector's ostensible authority for the collection of the taxes herein involved was Act 2657, and that the Act of Congress of June 4, 1918, ratified only Act 2711.

IV

The Act of Congress of June 5, 1920, can not have the effect of confiscating the judgment under review.

This action was commenced in the Court of First Instance of Manila in February, 1918, (Record, p. 1). In July, 1918, that Court ordered the entry of judgment, (Record, pp. 12-17). Both parties appealed. The Philippine Supreme Court entered its judgment in March, 1920, (Record, pp. 48-50). By this judgment respondent became entitled to recover from petitioner the amounts which petitioner had exacted as taxes under the ostensible authority of section 1614 of Act 2657. June 5, 1920, Congress in an appropriation act (41 Stat. L. 1025) provided:

> "The taxes imposed by the Philippine Legislature in section 1614 of the Act numbered 2657, enacted by that body on February 24, 1916, are legalized and ratified, and the collection of all such taxes made under or by authority of such Act of the Philippine Legislature is legalised, ratified, and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

Petitioner contends that this enactment is effective, not only to validate the collection of such taxes as were paid without protest, not only to defeat pending actions for the recovery of taxes exacted without prior authority —but also to reverse, annul, or confiscate, the judgment herein reviewed.

For the purpose of argument under this head it must be assumed that the ratification intends the effect attributed to it by petitioner: To operate retrospectively; to supply for the period of the controverted collections the authority which at the time was not only withheld from, but specifically denied to, the Philippine government and its officials; to apply, not only to collections undisputed or still in controversy, but to obligations merged in judgment; concretely, to relieve and dis-

charge James J. Rafferty from his judgment debt to respondent. Later it will be argued that the ratification may not be so construed; but the present question is whether Congress had power to accomplish what petitioner claims—whether the Act, with petitioner's construction, is valid.

It is significant that the diligence of petitioner's counsel has produced no reported case wherein a curative statute has been held effective to divest a right reduced to judgment. (Note the admission of failure at p. 46 of brief). The decisions upholding retrospective statutes to cure irregularities as against claims not reduced to judgment, of which many are quoted or cited by petitioner, do not require particular notice. All are distinguishable in that they do not involve the overthrow of judgments, and most of them present other obvious and vital differences that make them inapplicable herein. None of them goes so far toward being in point as *United States* v. *Heinszen & Co.*, 206 U. S. 370, and if, as respondent will endeavor to show, that case is not controlling, all the others fall with it.

The proposition that a statute may divest rights established by a judgment is so abhorrent to our fundamental principles and to natural justice, as well as to familiar constitutional limitations, that there are few instances in our jurisprudence where the attempt has been made and passed upon. Nevertheless, there is plain condemnation of the theory in the decisions of this Court.

> "It is not within the power of a legislature to take away rights which have been once vested by a judgment." *McCullough* v. *Virginia*, 172 U. S. 102, 123.
>
> "It is undoubtedly true that legislatures cannot set aside the judgments of courts." *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 478.

"But it is urged, that the Act of Congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff. This, as a general proposition, is certainly not to be denied, especially as it respects adjudication upon the private rights of parties. When they have passed into judgment the right becomes absolute and it is the duty of the court to enforce it. * * * Now, we agree, if the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of Congress." *Pennsylvania* v. *Wheeling & B. B. Co.*, 18 How. 421, 431.

In the State courts there is an unbroken line of authorities denying the power of the legislature to vacate judgments, to grant new trials, or in the form of curative statutes to divest judgment rights. In these cases the condemnation of the statute is generally based upon legislative invasion of judicial power, but in all it might equally have been said that the statutory assault upon vested rights was not due process of law, and in some of the decisions this is recognized.

Haley v. *City*, 68 Penn. St. 45
Taylor v. *Place*, 4 R. I. 337
Sanders v. *Cabaniss*, 43 Ala. 184
Lawson v. *Jeffries*, 47 Miss., 702
Griffin v. *Cunningham*, 20 Gratt. 54

While *United States* v. *Heinszen & Co.*, *supra*, holds that a Congressional ratification may destroy a mere right of action, practically overruling in this respect *De Lima* v. *Bidwell*, 182 U. S. 1, yet the reasoning, by distinction, compels the conclusion that a claim reduced to judgment is immune. In the quotation the italics are supplied.

"Nor does the mere fact that, at the time the ratify-

ing statute was enacted, this action *was pending* for the recovery of the sums paid, cause the statute to be repugnant to the Constitution. The mere commencement of the suit did not change the nature of the right. * * *

"Considering how far the bringing of actions would operate to deprive government of the power to enact curative statutes which, if the actions had not been brought, would have been unquestionably valid, Cooley, in his Constitutional Limitations, says (7th ed. p. 543):

"'Nor is it important, in any of the cases to which we have referred, that the legislative act which cures the irregularity, defect, or want of original authority, was passed after suit brought, in which such irregularity or defect became matter of importance. The bringing of suit vests in a party no right to a particular decision (cases cited); and his case must be determined on the law as it stands, not when the suit was brought, but *when the judgment is rendered.* (Cases cited.)'" (p. 387.)

The judgment herein is final, to the extent of creating a property right that cannot be divested by subsequent legislation.

It is immaterial that the judgment may not be immediately executed because of the granting of a writ of certiorari herein. The immunity of respondent's judgment from legislative confiscation does not depend upon its finality in the sense of not being subject to judicial review. If the interposition of this court had the effect of vacating the judgment and bringing the cause here to be tried *de novo*, the case might, arguably, be different; but upon the allowance of the writ, the judgment is reviewed "as if brought up by writ of error," and it is precarious only to the extent that error may be found. If the judgment is declared free from error, its affirmance by this court will in no way enhance its value or change its character. The ultimate question is

whether the judgment is "property" of respondent, such as may not be taken without due process; the review herein is an examination of respondent's title to the property—not a proceeding from which such title may arise. A judgment creditor in a case reviewable for error may be divested of his property in the judgment, but only by "due process of law"—which judicial reversal is, and legislative confiscation is not.

Heinszen Case further distinguished.

There is a fundamental difference between the ratification sustained in *United States* v. *Heinszen & Co., supra,* and the ratification asserted by petitioner herein, in that the one supplied a mere *absence* of prior authority, while the other is invoked to cure an express *denial* of authority. This difference is inferentially recognized in the *Heinszen* opinion, where the court says (p. 382):

> "Where an agent, *without* precedent authority, has exercised in the name of the principal a power which the principal *had the capacity to bestow*, the principal may ratify and affirm the unauthorized act, and thus retroactively give it validity when rights of third parties *have not intervened*, is so elementary as to need but statement." (Italics supplied.)

It is equally obvious that where the principal has denied authority to his agent and third parties have relied upon such denial, the principal may not thereafter retroactively give validity, in prejudice of such third parties, to acts of the agent in contumacious exercise of the power denied.

The principles involved are those of agency, as the *Heinszen* decision makes clear, and the distinction may be made plain by a simple illustration. If my pretended agent, without precedent authority, collects rents from an

occupant of my house, I may ratify such collection; but if I have agreed with my tenant that his rent shall be $100 per month, and my agent compels him to pay under duress and protest $150 per month, no ratification on my part would validate the extortion. So, when Congress enacted "that no export duties shall be levied or collected on exports from the Philippine Islands," it deprived itself for so long as the prohibition stood unrepealed of "the capacity to bestow" power to collect such duties. The prohibition was revocable at the will of Congress, but so long as it remained in force as a restriction on the Philippine Government and its tax-collectors, third parties enjoyed the right of exemption from export duties, terminable, but not subject to be retroactively divested.

Mr. Justice Harlan, concurring in the majority opinion in the *Heinszen* case, says (p. 391):

> "Interpreted in the light of previous and pending litigation, this act should be construed as denying the authority of any court to take cognizance of a suit brought against the United States to recover any claim arising out of such collections. The act should, therefore, be construed as withdrawing the consent of the United States to be sued on account of claims of that character. In this view, it was error to render judgment against the United States, whatever might be the liability of the Collector, if his exaction of the duties in question was without authority of law. Upon this ground alone and without considering any of the questions discussed in the opinion of the court, I concur in the judgment of reversal."

In that case the suit was against the United States. In this case the suit is against James J. Rafferty, an individual. It involves only "the liability of the Collector." Mr. Justice Harlan's principle therefore cannot be urged in support of the alleged ratification in this case. The dis-

tinction is clear between an Act of Congress withdrawing the government's consent to be sued, and an Act which pretends to relieve one individual from his judgment debt to another.

Respondent's vested right in his judgment analagous to vested rights secured by exemption from taxation.

There is no more familiar example of vested rights immune from a taking without due process than exemption from taxation. Such exemption is commonly in perpetuity or for a fixed period, but it might imaginably be granted without term. Can it be doubted that an attempt to take away such exemption retrospectively would be invalid? Whether such an exemption is definite or precarious, it is property and has been held by this Court to be protected by the Constitution against Congressional action. In the case of *Choate v. Trapp*, 224 U. S. 665, it appears that Congress by the Curtis Act of 1898, amended in 1902, provided for the allotment of tribal lands of Indians and for exemption of the individual holdings from taxation. In 1908 an Act of Congress pretended to authorize taxation of the same lands. The State of Oklahoma attempted to impose taxes and the Indians resisted. This Court, by Mr. Justice Lamar, says (p. 673):

> "The patent issued in pursuance of those statutes gave the Indian as good a title to the exemption as it did to the land itself. Under the provisions of the 5th Amendment there was no more power to deprive him of the exemption than of any other right in the property."

To the same effect is the very recent case of *Ward* v. *Love County*, 253 U. S. 17. Would not the result have been the same if the exemption from taxation had been indefinite and revocable, and Congress had attempted to

ratify taxes imposed by the State before the repeal of the exemption?

Even in the Philippine Islands no person may "be deprived of life, liberty or property without due process of law."

From a misunderstanding of the "Insular Cases" and certain subsequent decisions of this Court there has arisen a wide-spread belief that Congress has power unlimited to legislate for the Insular Possessions; that none of the safeguards and limitations of the Constitution of the United States protect lives, liberties and property in the Possessions against Congressional action. This belief has no foundation in the decisions of this Court, and none in principle.

If there is no decision of this Court affirmatively applying any guaranty or limitation of the Constitution in the Philippine Islands or Porto Rico, the reason is plain; the occasion has not arisen. No case has been presented in this court wherein Congress legislating for the Possessions, has attempted to pass a Bill of Attainder, to grant a Title of Nobility, to prohibit the free exercise of religion, nor, without due process of law, to deprive any person of life, liberty or property.

In cases wherein insular legislatures have encroached upon personal rights, the decisions have been based upon the guaranties of Congressional organic laws, and the Court has avoided as unnecessary determining whether the corresponding provisions of the Constitution would have been applicable. Thus in *Kepner* v. *United States,* 195 U. S. 100, Justice Day says (p. 124): "It is not necessary to determine in this case whether the jeopardy provision in the Bill of Rights would have become part of the law of the Islands without Congressional legislation."

On the other hand, the power of Congress over the

Insular Possessions is derived from the same provision of the Constitution—Art. IV, Sec. 3, par. 2—which supported the jurisdiction of Congress in the Territories which later became States. And it has been held, as we shall see, that in legislating for those Territories Congress was not wholly exempt from constitutional limitations.

It has been held that the Uniformity Clause of Art. 1, Sec. 8, does not apply to duties imposed by Congress in the Possessions, because the section requires uniformity only "throughout the United States," and the Possessions are not a part of the United States. *Downes* v. *Bidwell*, 182 U. S. 224. But in that case even the majority of the Court conceded that the Constitution contains limitations which operate upon the power of Congress wherever exercised; and it is apparent that the decision would have gone the other way if the requirement of uniformity had been stated in the Constitution without the qualifying phrase.

It has been held, also, that the right to trial by jury conferred by the sixth amendment does not extend to the Territories and Possessions. *Hawaii* v. *Mankichi*, 190 U. S. 197; *Dorr* v. *United States*, 195 U. S. 138. But in the Mankichi case Justice Brown says for the Court (p. 217): "We would even go farther, and say that most, if not all, the privileges and immunities contained in the Bill of Rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case (indictment by grand jury and trial by jury) are not fundamental in their nature but concern merely a method of procedure * * *." And Justices White and McKenna, concurring, point out that Hawaiian laws must yield, "Where they were inconsistent with those fundamental provisions of the Constitu-

tion which were, by their own force, applicable to the territory with which Congress was dealing."

In the Dorr case, Justice Day says:

> "The exercise of the power expressly granted to govern the territories is not without limitations. Speaking of this power, Mr. Justice Curtis, in the case of *Scott* v. *Sandford*, 19 How. 614, 15 L. ed. 787, said:
>
> " 'If, then, this clause does contain a power to legislate respecting the territory, what are the limits of that power?
>
> " 'To this I answer that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that in the exercise of the legislative power, Congress cannot pass an *ex post facto* law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution.' " (p. 142).
>
> * * * * * * *
>
> "The limitations of this power were suggested by Mr. Justice Curtis in the *Scott Case*, above quoted, and Mr. Justice Bradley in the *Church of Jesus Christ of L. D. S.* v. *United States*, 136 U. S. 1, 34 L. ed. 481, 10 Sup. Ct. Rep. 792, said:
>
> " 'Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions.' " (p. 146.)

In *Downes v. Bidwell*, 182 U. S. 262, Justice Brown says, for the majority of the Court:

> "To sustain the judgment in the case under consideration, it by no means becomes necessary to show that none of the articles of the Constitution apply to the island of Porto Rico. There is a clear distinction

between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only 'throughout the United States' or among the several States.

"Thus, when the Constitution declares that 'no bill of attainder or *ex post facto* law shall be passed,' and that 'no title of nobility shall be granted by the United States,' it goes to the competency of Congress to pass a bill *of that description.* Perhaps the same remark may apply to the 1st Amendment, that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble and to petition the government for a redress of grievances.' We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local application." (p. 276.)

* * * * * * *

"We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. * * *" (p. 282.)

In the same case Mr. Justice White, for himself, and for Mr. Justice Shiras and Mr. Justice McKenna, concurring says:

"While, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for any and all of the territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended" (p. 290).

* * * * * * *

"Undoubtedly there are general prohibitions in the Constitution in favor of the liberty and property of the citizen, which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts." (p. 294).

The grounds of dissent in the Insular cases show that *all* of the Justices were agreed that the "general prohibitions" in support of "natural rights" limited the power of Congress to legislate for the Possessions.

Among these effective limitations is certainly that of the 5th Amendment:

"No person shall * * * be deprived of life, liberty, or property, without due process of law."

In *Fletcher* v. *Peck*, 6 Cranch 87, the State of Georgia had authorized by statute the sale of state lands. After conveyances had been made by virtue of this statute the State Legislature by another statute undertook to annul and rescind the first law and to avoid the titles acquired by its authority. The case involved the prohibition of Art. I, sec. 10, whereby the States are forbidden to impair the obligation of contracts. But the opinion of Chief Justice Marshall is of especial interest for our present inquiry.

"Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held? (p. 135).

"The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.

"The correctness of this principle, so far as respects general legislation, can never be controverted. But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power * * *

"It may well be doubted whether the nature of society and of government does not prescribe some limits to this legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?

"To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection.

* * * * * * *

"The validity of this rescinding act, then, might well be doubted were Georgia a single sovereign power * * * (p. 136).

* * * * * * * * * *

"The state legislatures can pass no *ex post facto* law. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural mean-

ing of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law annulling the title by which he holds that estate? The Court can perceive no sufficient grounds for making this distinction. * * * " (p. 138).

In the same case Mr. Justice Johnson, concurring, denies the application of Act I, Sec. 10, and puts his assent squarely on the ground of general principles:

> "I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things; a principle which will impose laws even on the Deity." (p. 143).

Authorities might be multiplied, but there will hardly be dissent from the principle. The confiscation of private property by legislation, "without due process of law," is so abhorrent to the whole spirit of the Constitution, that if, as the *Insular Cases* so strongly suggest, there are limitations which Congress may not disregard in legislating for the territories, the "due process clause" is one of them. Indeed, it is so specified by Justice Brown in Downes v. Bidwell, *supra*—"The right to * * * individual property * * * to due process of law."

V

The ratification by Act of June 5, 1920, covers only the period between July 1 and Aug. 29, 1916.

It will be convenient here to review the pertinent facts and dates. Act 2657 was approved in February, 1916, and took effect July 1, 1916. Up to that time, and until August of the same year, the Philippine government lacked power to impose export duties, but there was no express denial of such power. Nevertheless, Sec. 1614 of Act 2657 purported to apply the 1% merchants' tax to export sales and con-

signments. The Autonomy Act was approved by Congress August 29, 1916, and in sec. 11 provided, "That no export duties shall be levied or collected on exports from the Philippine Islands," thus repealing *pro tanto* Act 2657, for, as Chief Justice Marshall says in *M'Culloch* v. *Maryland*, 4 Wheat. 316, 425:

> "A law, absolutely repugnant to another as entirely repeals that other as if express terms of repeal were used."

The amounts covered by the judgment herein were levied and collected after August 29, 1916, and under the ostensible authority of the repealed provisions of Act 2657. In 1920 Congress enacted the ratification, which, for convenient reference is here again quoted:

> "The taxes imposed by the Philippine Legislature in section 1614 of the Act numbered 2657, enacted by that body on February 24, 1916, are legalized and ratified, and the collection of all such taxes made under or by authority of such Act of the Philippine Legislature, is legalized, and ratified, and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

Does this provision repeal the prohibition of sec. 11 of the Autonomy Act in so far as the latter affected sec. 1614 of Act 2657? Not expressly. But does it work such repeal by implication, as being a later statute "absolutely repugnant to" the earlier? Such a result is to be avoided if possible; if more than one construction is applicable, that must be preferred which will enable the two statutes to stand together.

> "Repeals by implication are not favored. This means that it is the duty of the Court to so construe the acts, if possible, that both shall be operative." Lewis' Sutherland, Statutory Construction, sec. 247.

> "The intention to repeal * * * will not be presumed, nor the effect of repeal admitted, unless the inconsistency is unavoidable, and only to the extent of the repugnance." id., id.
>
> 25 R. C. L. 918, secs. 169, 170.

We are considering a ratification. *In United States* v. *Heinszen*, 206 U. S. 380, at page 384, Mr. Justice White adopts the statement from *Mattingly* v. *District*, 97 U. S. 687, 690:

> "The ratification, if made, was equivalent to an original authority, according to the maxim, *Omnis ratihabitio retrotrahitur et mandato priori aequiparatur.*"

And Congress in the statute itself defines the effect to be given to its action: "As fully to all intents and purposes as if the same had, by prior Act of Congress, been specifically authorized and directed." Surely it can not be thought that ratification is *more* effective than prior authorization.

Let us apply the test prescribed by Congress. Suppose that there had been in force in February, 1916, an Act of Congress which "specifically authorized and directed" the enactment of sec. 1614 of Act 2657. Then the export duties imposed by that section would have been perfectly valid until August 29, 1916, when Congress directed that they should no longer be levied or collected; after that date they would have been invalid. Such is the exact effect of the ratification; it supplies the original authority, which theretofore was lacking for sec. 1614 of Act 2657 in its application to exports, for so long as that section was effective; but it does not prolong the life of the section nor validate collections which, being made after August 29, 1916, were not "under or by authority of" the provisions then repealed.

It may be unusual, but it is by no means impossible, nor is it unprecedented, to ratify for the term of its existence a statute which has been repealed. Congress by Act of July 1, 1916, ratified Acts 2541 and 2622, which had died by repeal the day before. (See II, *supra*.) The situation would be exactly the same if the repeal and ratification had been synchronous; if the ratification of 1920 had been incorporated in the Autonomy Act together with the prohibition of export duties, the two provisions would have fitted together perfectly, the one operating retrospectively and the other prospectively.

Petitioner's sole argument against the interpretation which respondent puts upon the ratification of 1920 is that the statute provides for the legalization of the collection of *"all* such taxes." (Brief, p. 59.) Counsel's italics are not carried far enough—Congress legalized the collection of "all *such* taxes (i. e., those imposed by section 1614 of Act 2657) made *under* or *by authority of such Act"* and only *"as* fully—as if the same had by prior Act of Congress been specifically authorized and directed." The amounts which James J. Rafferty has been ordered to repay to respondent are not "taxes imposed * * * in section 1614 of the Act numbered 2657", nor were they collected "under or by authority of such Act," because that section, in so far as it imposed export duties, had been repealed or annulled by the sovereign power of Congress and no longer afforded authority for the collection of export duties. Whatever authority Mr. Rafferty may have pretended for the controverted exactions, in reality he had none.

In this respect an interesting analogy is afforded by another ratification act, as construed in *Lincoln* v. *United States*, 202, U. S. 484. In that case the disputed collections, import duties, had been collected, under the osten-

sible authority of an order of the President, after the ratification of the Treaty of Paris. The Court held that the President's powers, without Congressional support, ceased with the war. Congress, by sec. 2 of the Act of July 1, 1902, ratified "the actions of the authorities of the Government of the Philippine Islands taken in accordance with the provisions of said order." It was held that the President's order, having no authority except the war power, was limited to the duration of the war as clearly as if so expressed; that import duties collected after the ratification of the treaty were, therefore, not "in accordance with the provisions of said order"; that, while Congress might have ratified such collections (as was subsequently done), the terms of the statute under consideration only affected collections made during the life of the President's order.

> "The statute does not ratify all actions or all collections of taxes, as it easily might have done, but only actions in accordance with the order." (p. 498.)

So, in this case, the authority ratified is that of sec. 1614 of Act 2657, which, in respect to export duties, ceased on August 29, 1916, by virtue of sec. 11 of the Autonomy Act; and the ratification by its terms is limited to actions "under or by authority of" the section specified. Congress might easily have said that the ratification was of *all* collections of export duties, but chose to restrict the validation to such as were made by authority of section 1614.

Here, as in the *Lincoln* case, "Every consideration requires that the ambiguous language of the act should not be stretched beyond the exact and literal meaning of the words" (p. 499). Here, as there, the ratification has a proper and useful application in its restricted interpretation; here, as there, there were pending actions which Congress may not be presumed to have intended to destroy

in the absence of clear expression of such intention—a principle of greater force herein because the actions were not merely pending, but reduced to judgment. In *United States* v. *Heinszen & Co., supra,* the court, citing the Lincoln case, says (206 U. S. at p. 390):

> "In the course of the opinion, in answering the argument that the alleged ratifying statute would be meaningless unless it were held applicable to the particular duties in controversy, it was pointed out (202 U. S. p. 499) that there were duties levied and collected other than those in controversy, to which the act clearly applied, and 'that question (as to them) was put at rest by this ratification.' Further in calling attention to the ambiguity in the ratifying statute relied upon and the resulting doubt whether it embraced all duties, it was pointed out that the fact that actions were pending at the time of the ratifying act lent cogency to the view that, if Congress had intended by the ratification to affect them, it would have explicitly so declared. On this subject the Court said (p. 498):
>
> "'This construction is favored by the consideration that the suits had been begun when the Act of July 1, 1902, was passed, and that, even if Congress could deprive plaintiffs of their vested rights in process of being asserted (Hamilton v. Dillin, 2 Wall. 73), still it is not to be presumed to do so on language which, literally taken, has a narrower sense.'"

The conclusion that Congress intended the more restricted effect of the ratification of 1920 is further impelled by the known circumstances. In 1918 Congress was urged by the Philippine Government to ratify Act 2657 as well as Act 2711, and refused (petitioner's brief, p. 27; *supra*, p. 7). In 1920 the plea for ratification must have embraced the period involved in this cause (and in other cases still pending in the Philippine Courts). This court had pointed out the restricted scope of the ratifi-

cation in the *Lincoln* case, and had added emphasis by giving broader effect to the ratification in the *Heinszen* case. When, with all this information and advice, Congress chose to employ the formula construed in the *Lincoln* case, failed to declare explicitly its purpose to affect pending actions or judgments, refrained from ratifying *all* collections—there can be only one inference. Congress intended to sanction only the export duties collected *without* authority and before the Autonomy Act—not such duties collected in *defiance* of the prohibition while the latter stood unimpaired.

It has been argued (IV *supra*), that the construction given the ratification of 1920 by petitioner would violate the guaranty of due process of law. If that contention is sound, there arises a strong presumption in favor of such a construction as will avoid the result of unconstitutionality. (Lewis' Sutherland, Statutory Construction, sec. 83; 1 Fed. Stats. Ann., p. 107; *St. Louis* v. *Arkansas*, 235 U. S. 350.) But if both constructions are possible, and both constitutional, that one must be preferred which is consonant with fairness and natural justice. Retrospective taxation, particularly on gross income, has necessarily an element of unfairness. But in this case there is more than that—sec. 11 of the Autonomy Act afforded to Philippine exporters a guaranty upon which, so long as it stood unrepealed, they were perfectly entitled to rely in making their prices and their contracts. It would have been indecent for them even to suspect that Congress would stultify its declaration and retrospectively sanction the impudent disregard by Philippine officials of the Congressional prohibition. To ratify in 1920 taxes on gross income of 1916-1917, which had been expressly prohibited during that period, would be outrageous.

"The supposition that the government will not pay its debts or will not do justice is not to be indulged." *Gibbons* v. *United States*, 8 Wall. 269, 274.

VI

If Petitioner's collection of the taxes was unlawful, the award of interest was not error.

If petitioner unlawfully exacted the payments covered by the judgment under review, then his subsequent retention of the money was equally unlawful. The remedy for the initial wrong is repayment of the principal; the remedy for the subsequent and continuing wrong is the payment of interest.

The Philippine law forbids the courts to enjoin the collection of disputed taxes. Act 2711, sec. 1578; Act 2657, sec. 1720. The only redress of an aggrieved taxpayer is by payment under protest, and, upon denial of administrative relief, recovery by suit. *Churchill* v. *Rafferty*, 32 Phil. 593. If Philippine statutes are construed to limit such recovery to the principal, to deny compensation for loss of use of money unlawfully taken, they must be held invalid for violation of the provisions of the Autonomy Act, Act of Congress of August 29, 1916.

If the Philippine government might not impose export duties, neither might it require of exporters involuntary and uncompensated loans. If the Philippine government had no power to collect as taxes the sums involved herein, may retain them for years and be discharged of all obligations by repayment without interest, then private property will have been taken for public use without just compensation; for the use of money is property as well as the money itself.

The Philippine Legislature could not relieve the petitioner of his personal obligation to make good the

damage resulting from his unauthorized acts. A statute may properly provide that interest shall not be recoverable on voluntary loans in the absence of stipulation to the contrary; but it is quite another thing to deny compensation for the loss of use of money taken unlawfully and under duress. If petitioner may discharge his obligation by mere repayment of principal, then the law so providing deprives respondent of the use of its money—which is property—without due process of law.

Section 1579 of Act 2711, invoked by petitioner, authorizes an action against the Collector of Internal Revenue, after the performance of certain conditions, to recover "without interest" sums unduly exacted as internal revenue taxes. Given prospective application, and limited to the special remedy which it affords, the section with its limitation may be justified If, however, it is so construed as to govern an action to enforce the personal obligations of the petitioner, or to apply to an action to recover sums exacted under the authority of a former law, superseded by Act 2711, which authorized recovery with interest, section 1579 contravenes the Autonomy Act. The Philippine Supreme Court has held that section 1579 is inapplicable herein, and the presumption is strong in favor of such a construction to avoid the result of unconstitutionality. Lewis Sutherland, Statutory Construction, sec. 83, 1 Federal Statutes Annotated, p. 107; *St. Louis* v. *Arkansas*, 235 U. S. 350.

In favor of the construction adopted by the Court below, as against the theory of petitioner which would deny compensation for the unlawful retention of respondent's funds, is the rule that the legislature is presumed not to have intended to work hardship or injustice. Lewis' Sutherland, op. cit., secs. 488, 490; 1 Fed. Stats. Ann., p. 101; *Lionberger* v. *Rouse*, 9 Wall., 475.

The question turns on local law.

The award of interest by the Philippine Supreme Court is based entirely upon the construction and application of Philippine law. The general rule in the Islands is set out in Art. 1108 of the Civil Code, cited by the Court below (Record, p. 32):

> "Should the obligation consist in the payment of a sum of money, if the debtor should become in default, the indemnity for damages, in the absence of a stipulation to the contrary, shall consist in the payment of the interest agreed upon, or, should there be no agreement, in the payment of interest at the legal rate.
>
> "Until another rate is fixed by the government, the legal rate of interest shall be six per cent per annum."

That this provision applies to the obligation to repay arising from unlawful exactions of tax collectors, has been determined by the Supreme Court of the Philippine Islands, not only in the instant case, but in other decisions. *H. E. Heacock Co.* v. *Insular Collector*, 37 Phil., 970; *Hongkong & Shanghai Banking Corporation* v. *Rafferty*, 39 Phil., 145; *Palanca* v. *City*, XVIII Official Gazette, No. 89, p. 2725.

While there was a dissent in the court below as to the adjudication of costs, the Justices were unanimous in awarding interest, and this circumstance strengthens the presumption which attaches to a determination of Philippine law by the highest court of the Islands.

> "We follow and sustain the local law as applied by the court below unless we are constrained to the contrary by a sense of clear error committed." *Villanueva* v. *Villanueva*, 230 U. S., 293, 299.

This is not an action against the Government.

In the case of a disputed internal-revenue tax of the United States the protestant taxpayer may sue the United States by authority of the Tucker Act, or he may sue the collector personally. If he elects the former remedy, he takes it with the limitations which are imposed upon the waiver of the sovereign's immunity; but if he chooses to sue the collector, the indirect interest of the United States and even the statutory assurance that the Treasury will respond for the judgment do not preclude a full recovery with interest and costs.

> "The distinction appears to be between suits to recover moneys illegally exacted as taxes and paid under protest, brought against collectors, although the judgment is not to be paid by the collector, but directly from the Treasury, and suits against the United States." *Viuda* v. *Rafferty*, 37 Phil. 957, 965.

And so it is in the Philippine Islands: the aggrieved taxpayer has a special action, substantially against the government, under the authority of Sec. 1579 of Act. 2711, or the corresponding section of preceding codes; and he has his action against the collector personally upon the quasi-contractual obligation arising from the receipt of what is not due, defined in Arts. 1895—1901 of the Civil Code.

The defendant herein is James J. Rafferty. It is true that Mr. Rafferty was the Collector of Internal Revenue during the period of the controverted collections; his office enabled him to coerce the payments. It is true, also, that when the complaint was filed Sec. 1579 of Act 2711 authorized an action against the Collector of Internal Revenue for the recovery "without interest" of the sums alleged to have been illegally collected. But it does not follow that this action is governed by said section 1579.

"Collector of Internal Revenue" is the title of the chief

of the Bureau of Internal Revenue (Act 2711, Sec. 1421). Internal Revenue taxes may be collected by deputies and subordinates (id., sec. 1426), or by the "Collector of Internal Revenue" himself, for example in his *ex-officio* capacity of City Assessor and Collector of Manila (id., sec. 1422). In the absence of statutory authority an aggrieved taxpayer might not sue the Philippine government nor any of its agents in his official capacity, but must rely entirely upon the personal responsibility of the officer who had exacted the payment unduly. But since 1914, at least, the internal-revenue law has authorized an action against the "Collector of Internal Revenue," "the process to be served upon him, upon the provincial treasurer, or upon the officer collecting the tax" (Act 2711, sec 1579; Act 2657, sec. 1721; Act 2339, sec. 140). For this action it does not matter whether the protested payment had been made to the chief of the bureau or to a subordinate; the liability imposed upon the defendant is derived from the statute alone and depends upon the official position of the defendant; the remedy is conditioned upon the previous performance of specified conditions and, in cases governed by Act 2711, is limited to recovery of the principal.

But the establishment of this special remedy has not precluded the taxpayer's right to sue personally the officer who exacted the undue payment, whether the chief of the bureau or another. As in the United States R. S. sec. 989 recognizes the personal liability of collectors and provides for their protection against personal judgments, so sec. 1583 of Act 2711 makes similar provision for the case of personal judgments recovered against Philippine collectors.

> "Sec. 1583. Satisfaction of judgment recovered against treasurer or other officer.—When an action is brought against any revenue officer to recover damages by reason of any act done in the performance of

official duty, and the Collector of Internal Revenue is notified of such action in time to make defense against same, through the Attorney-General, any judgment, damages or costs recovered in such action shall be satisfied by thé Collector of Internal Revenue upon approval of the Department head, or if the sum be paid by the person sued, shall be repaid or reimbursed to him.

"No such judgment, damages, or costs shall be paid or reimbursed in behalf of a person who has acted negligently or in bad faith, or with wilful oppression."

The same provisions are found in the preceding codes. Act 2657, sec. 1725; Act 2339, sec. 144.

The analogies indicated bring into perfect application the decisions of this Court and of inferior Federal Courts to the effect that the immunity of the government from payment of interest does not prevent such recovery in an action against the collector, and that interest is none the less allowable because the judgment is payable out of the Treasury. *Erskine* v. *Van Arsdale*, 15 Wall., 68; *Patton* v. *Brady*, 184 U. S., 608; *National Home* v. *Parrish*, 229 U. S. 494; *Sage* v. *United States*, 250 U. S., 33; *White* v. *Arthur*, 10 Fed. 80; *McClain* v. *Pennsylvania Co.*, 108 Fed. 618; *Conant* v. *Kinney*, 162 Fed. 581; *State Line* v. *Davis*, 228 Fed. 246; *New York L. I. Co.* v. *Anderson*, 263 Fed. 527.

The principle applies *a fortiori* in the Philippine Islands because section 1583, *supra*, provides for the payment of "judgment, *damages* or costs," and has been construed by the Philippine Supreme Court to cover specifically the award of interest.

> " 'Damages' for the wrongful exaction or withholding of money is the payment of interest at the legal rate (Art. 1108, Civil Code)." *H. E. Heacock Co.* v. *Insular Collector*, 37 Phil. 970, 982.

That this action is against James J. Rafferty personally

under the Civil Code, and not against the Collector of Internal Revenue in his official capacity under the authority of the Administrative Code, appears from the pleadings and from the decisions of the Philippine Courts. The complaint necessarily describes defendant as Collector of Internal Revenue, but neither in the title nor in the allegations is Mr. Rafferty made defendant *as* such Collector; the allegations show that the disputed payments were made to James J. Rafferty, and the prayer is for judgment against James J. Rafferty "with interest;" there is no allegation of the exhaustion of the administrative remedy which is made a condition precedent of the right of action granted in sec. 1579 of Act 2711. (Record, pp. 2-10.) The answer conforms to the complaint, admits its allegations, and fails to assert any defense based upon sec. 1579 or upon the theory that Mr. Rafferty is sued in his official capacity. (Record, p. 12.) The decision of the Court of First Instance recites that the action has been brought "to recover from the defendant, James J. Rafferty," and although no interest was allowed by that court, there is no reference in the decision to sec. 1579 nor reason for the refusal of interest. (Record, pp. 13-17.)

The decision of the Philippine Supreme Court awards interest, and the majority opinion cites as authorities for such award the *Erskine* and *National Home* cases, *supra*, as well as Art. 1108 of the Civil Code and sec. 144 of the Internal Revenue Law of 1914 (Act. 2339), which is identical with sec. 1583, *supra*, (Record, p. 32). The determination, so indicated, that the action is a personal one against the collector, involves only the construction and application of local law, and is, of course, very persuasive. *Villanueva v. Villanueva*, 239 U. S. 293.

The decision of the Court of First Instance was given July 25, 1918, and the decision of the Philippine Supreme

Court January 26, 1920. Wenceslao Trinidad succeeded James J. Rafferty as Collector of Internal Revenue, February 8, 1918. This may be judicially recognized. *Richardson* v. *McChesney*, 218 U. S. 487, 492. If the action had been against Mr. Rafferty in his official capacity, he would, of course, have been substituted as defendant by his official successor; this is recognized by petitioner, who in support of his present reliance upon sec. 1579, and somewhat tardily, urged in connection with his petition for the writ of certiorari that the substitution be made in this Court (Brief in Support of Petitions, pp. 3, 5). That judgment was rendered by the Court of First Instance and by the Philippine Supreme Court against James J. Rafferty after he had ceased to be Collector of Internal Revenue is further proof that he defended in his personal capacity.

Section 1579 of Act 2711 is inapplicable.

Even if this action were held to be brought against the Collector of Internal Revenue in his official capacity, and, therefore, substantially against the Philippine Government, it would be governed by sec. 1721 of Act 2657 rather than by sec. 1579 of Act 2711. The former Act is the Administrative Code of 1916, superseded on October 1, 1917, by Act 2711, the Administrative Code of 1917, and the only difference in the two sections cited is that the later Code adds the phrase "without interest." The judgment under review, in that respect affirming the judgment of the Court of First Instance, denies a recovery of the collections made under authority of the Administrative Code of 1917, and orders the repayment only of those made under authority of the Administrative Code of 1916.

The minority of the Philippine Supreme Court, by Mr. Justice Malcolm, bottom their dissent from the award of

costs upon the theory that the suit is, in effect, against the Philippine Government, but concur in the award of interest, saying: "Judgment should be affirmed, with interest since this action was instituted and accrued before the Administrative Code of 1917 went into effect." (Record, p. 37.) The learned Justice is verbally inaccurate, because the complaint was filed February 7, 1918, but his meaning is clear and correct, that the measure of relief, under his theory of the nature of the action, must be governed by the same Code under which the undue collections were made. The majority opinion cites in support of the award of interest, *inter alia*, the cases of *H. E. Heacock Co.* v. *Insular Collector*, and *Hongkong & Shanghai Banking Corporation* v. *Rafferty*, *infra*, which hold that interest must be allowed under sec. 1721 of Act 2657 and its prototype in earlier laws. Thus the Philippine Supreme Court is unanimous in holding that *if* the action is substantially against the government, it is controlled, as to the allowance of interest, by the Administrative Code of 1916.

In the *Heacock* case, 37 Phil. 982, the action was against the Collector of Customs to recover import duties, and the provisions of the internal-revenue law did not directly apply; it was held, however, on general principles, that interest was recoverable from the government in the absence of express limitation in the waiver of immunity, and the Court pointed out, by way of analogy, that sec. 144 of Act 2339 (identical with sec. 1583 of Act 2711) specifically provided for the payment of interest awarded in suits against internal-revenue officers.

In the *Hongkong Bank* case, 39 Phil. 145, a judgment had been rendered in first instance against the Collector of Internal Revenue for the recovery of sums unduly exacted as internal-revenue taxes. Pending review on appeal, the Administrative Code of 1917 came into force

with the denial of interest of sec. 1579. The Court, reserving the question of the construction of sec. 1579 in other respects, held that it was not intended to operate upon rights accrued, and that plaintiff was entitled to interest under the corresponding section of the earlier laws. In the recent case of *Palanca* v. *City*, XVIII Official Gazette, No. 89, p. 2725, the Philippine Supreme Court cites and follows the Hongkong Bank Case.

It is true that this action was begun after October 1, 1917, when the Administrative Code of 1917 became effective, and that one of the recovered payments was made October 19, 1917 (fourth cause of action); but that payment, like the others, was exacted under the alleged authority of the Administrative Code of 1916, and was computed upon exports of the quarter ending September 30, 1917. Those exports were made, not only under the assurance of sec. 11 of the Autonomy Act, but under the guaranty of the internal-revenue law then in force that undue exactions of internal-revenue officers might be recovered with legal interest. The construction of sec. 1579 of Act 2711 whereby it is applied only to an action concerning taxes collected under the Code of which it is a part, is a fair and reasonable construction, avoids hardships and injustice, and saves a conflict with constitutional limitations. Such construction by concurrence of all the Justices of the Philippine Supreme Court can hardly be questioned.

The award of costs was not error.

The principles governing the award of costs are set out in the Philippine Code of Civil Procedure:

> "Sec. 487. Costs ordinarily follow result of suit. —Costs shall ordinarily be allowed to the prevailing party as a matter of course, but the court shall have

power, for special reasons, to adjudge that either party shall pay the costs of an action, or that the same be divided, as may be equitable."

The Court of First Instance allowed no costs, and failed to mention the "special reasons" for departure from the general rule. The majority opinion of the Philippine Supreme Court points out that it is established practice to impose costs upon an unsuccessful appellant in that Court, and that no good reason appears for an exception in this case. The minority, by Justice Malcolm, urges as "special reasons" that "no costs should be allowed against the Government of the Philippine Islands, in cases in which the Government of the Philippine Islands or a nominal representative of the Government is the unsuccessful party." (Record, p. 36.)

The reasons of the minority fail if this action is not in fact one against the government. The contention in this respect of respondent has been presented in the discussion of the award of interest. But even if the action is considered substantially against the government, it does not follow that costs should be denied to the successful appellee. The government by section 1579 of Act 2711 (and equivalent sections of preceding Codes) has waived its immunity from suit and thereby has submitted to such consequences as arise from the general procedural law and are not expressly excepted in the waiver. Certainly the sovereign's exemption from costs is no more sacred nor better established than the similar exemption from interest; both are justified by the same reasons. It is difficult to understand how the dissenting Justices, applying a law which made no express reservation in either respect, could find a basis for awarding interest and disallowing costs, unless, perhaps, on the theory that the Code of Civil Procedure leaves the incidence of costs to judicial discretion. If such a theory is sound,

then the determination of the majority of the Court is controlling. Of course, if sec. 1579 of Act 2711 were applicable herein it would strengthen the presumption in favor of the allowance of costs, for the Legislature's express denial of interest warrants the inference of intentional omission of a similar denial of liability to costs.

That the indirect interest of the Philippine government arising from its undertaking to pay the judgment herein is not a sufficient reason for an exception to the general rule, appears from the terms of sec. 1583 of Act 2711 (and its prototype in preceding Codes), which specifically authorize the payment of costs awarded in suits against internal-revenue officers. This provision of law must have been overlooked by the minority of the Philippine Supreme Court.

VII

The equities of the case are all with Respondent.

Petitioner, on page 52 of his brief, admonishes that the equities of the case should be inquired into, and adds

> "The respondents in the instant cases added to the price of their merchandise the amount of the percentage taxes which they paid to the government."

In this Petitioner is mistaken. There is not a word in the record to justify it. There couldn't be, because exactly the contrary is the fact. By reference to the chronology pp. VI-IX herein, it will be observed that for a time the merchants' tax was refunded when goods were exported. In other words, exports were exempt; this because it was thought the subject of export and import duties was one exclusively within the jurisdiction of Congress. This exemption was attempted to be removed by Act 2541, December, 1915, effective January 1, 1916. Doubt-

less during that early part of 1916 respondent, like other merchants, did add the tax to the price, but soon thereafter, to wit, August 29, 1916, Congress passed the Autonomy Act, reorganizing the Philippine Government. It was a solemn, comprehensive, enactment, among other things defining the powers of the Philippine Legislature. It is the final expression of Congress establishing government in the Philippines. It was matured by the years of previous experience, and the deliberations of Congress extending over a long period of time. During three years, 1913 to 1916, this Bill was constantly before Congress or a committee thereof. It was the subject of daily discussion in the Philippines, in the press and among the citizens. One of the most carefully matured features of the Bill,—one Congress insisted upon inserting in the most determined manner, was sec. 11, which said:

> "No export duties shall be levied or collected on exports from the Philippine Islands."

This solemn declaration of Congress everybody thought was the last word. Accordingly, Respondent, like other merchants in export business, understood that export taxes would no longer be charged, and they considered this in making prices at foreign ports in competition with the world. In other words, they thought this tax no longer existed, and they did not add it to their prices. To assume that Respondent did not expect Congress to make good its word is grotesque. To assume that, notwithstanding this express prohibition of Congress, a Philippine tax collector could retain such a tax, is equally grotesque. Respondent thought no export tax could or would be upheld, so made no provision for such tax when the goods were sold.

Even if respondent had shifted the burden by covering the percentage taxes in the prices of its exports, no equities

would arise from that fact to aid the petitioner. The "ultimate consumer" is not a party to this action, and we are concerned only with the comparative equities of petitioner and respondent. If petitioner, or the Philippine Government, may plead in excuse of an unlawful spoliation of respondent that the latter has been able to retrieve its losses, then any debtor may urge as a defense that the creditor has made due provision for bad accounts.

It may not be out of place here to observe that business has, during recent years, been subjected to tax burdens almost beyond its strength to bear, this in the normal course of things. But what a remarkable situation is presented by the claim that Congress in 1920 by a retroactive statute imposed a tax burden on the years 1916 and 1917—a tax which Congress had expressly promised business should never have to bear! Tell burdened business in 1920 it must lose property illegally seized for taxes four and three years before! Such a construction is repugnant to every sense of justice. It violates fair play between government and citizen. It destroys private rights, which is tyranny, and divests citizens of that reasonable protection under the law required by modern society.

Surely Congress cannot be presumed to have intended any such thing. Rather attribute to Congress fair and just dealing, and assume, as reason requires, that it ratified only those taxes collected prior to the Autonomy Act.

SUMMARY

Respondent contends that:

1. The taxes in question were export taxes, because levied on the value of goods exported, and, especially, are admitted to be such.
2. They were prohibited by Congress in the Autonomy Act of August 29, 1916, and therefore were illegally collected.

3. The only ratifying statute at all applicable, is that of June 5, 1920, which must be construed to have legalized only the taxes collected before the Autonomy Act, and not those for which Respondent secured judgment. If it be held that Congress intended to legalize the taxes for which Respondent secured judgment, then that act is null and void, in that it attempts to destroy property without compensation and without due process of law.
4. The judgment of the Philippine Supreme Court is conclusive respecting the interpretation of local laws governing costs and interest; and, in any event, the decision of that Court in the matter of costs and interest involved herein, is, in all respects, according to law and precedent, because
   a. The judgment is against an individual and not a government.
   b. The cause of action arose when there was no law forbidding interest.
   c. Respondent must be allowed interest or he will be denied adequate remedy for the injury sustained. Private property will have been taken for an alleged public use without due compensation.

Therefore, it is respectfuly submitted that the judgment of the Philippine Supreme Court herein should be affirmed.

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Attorney for Respondent.

Of Counsel:
W. H. LAWRENCE,
J. G. LAWRENCE.

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JAMES D. MAHER
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 140

JAMES J. RAFFERTY, As Collector of Internal Revenue for the Philippine Islands,

Petitioner,

vs.

COMPANIA GENERAL DE TABACAS DE FILIPINAS,

Respondent.

No. 142

JAMES J. RAFFERTY, As Collector of Internal Revenue for the Philippine Islands,

Petitioner,

vs.

VISAYAN REFINING COMPANY,

Respondent.

BRIEF FOR RESPONDENTS

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TABLE SHOWING CHRONOLOGICAL RELATION OF PHILIPPINE LAWS, ACTS OF CONGRESS, AND FACTS OF THIS CAUSE.

Dates	Philippine Laws	Acts of Congress	Facts
1914 July 1	Act No. 2339, "The Internal Revenue Law of 1914." Sec. 40 imposes a tax of 1/3% on merchants' sales. Sec. 41 exempts exports.	(This Act has not been ratified by Congress)	
1915	Acts No. 2432 and 2445 effective for the year 1915, amend Sec. 40 of Act 2339 by increasing tax to 1%. The exemption of exports is left in force.	(see Mch. 4, 1915 infra)	
Mch. 4		Act of Congress of March 4, 1915, ratifies the internal revenue taxes imposed by Acts 2432 and 2445. (38 Stat. L. 1143)	
1916	Act No. 2541, effective for the years 1916 and 1917, by amendment of Sec 40 of Act 2339 continues the 1% tax on merchants' sales, and by amendment of Sec. 41 of Act 2339 repeals the exemption of exports.	(see July 1, 1916, infra)	

TABLE SHOWING CHRONOLOGICAL RELATION OF PHILIPPINE LAWS, ACTS OF CONGRESS, AND FACTS OF THIS CAUSE—(Continued)

Dates	Philippine Laws	Acts of Congress	Facts
	Act. No. 2622, amending Act 2541, extends the 1% tax to "consignments."	(see July 1, 1916, infra)	
July 1		Act of Congress of July 1, 1916, ratifies the internal revenue taxes imposed by Acts 2541 and 2622. (39 Stat. L. 286)	
July 1	Act No. 2657, "Administrative Code of 1916," repeals Acts above mentioned and (Sec. 1614) imposes a tax of 1% on merchants' sales and consignments abroad; does not exempt exports. This Code took effect July 1, 1916.	(see June 5, 1920, infra)	
Aug. 29		Act of Congress of Aug. 29, 1916, "Autonomy Act," Sec 11: "no export duties shall be levied or collected on exports from the Philippine Islands."	
Oct. 1 to Dec. 31			The period during which exports were made and taxes thereon levied in both cases, for which judgments were secured.

TABLE SHOWING CHRONOLOGICAL RELATION OF PHILIPPINE LAWS, ACTS OF CONGRESS, AND FACTS OF THIS CAUSE—(Continued)

Dates	Philippine Laws	Acts of Congress	Facts
1917 Jan.			Taxes paid, protested, and actions herein started.
Oct. 1	Act No. 2711, "Administrative Code of 1917" effective Oct. 1, 1917, supersedes Act 2657; reimposes (Sec. 1459) the tax of 1% on merchants' sales and consignments abroad, without exempting exports. Sec. 1459 is still in force.	(see June 4, 1918, infra)	
Nov. 26			Judgments secured by respondents in Court of First Instance, Manila.

TABLE SHOWING CHRONOLOGICAL RELATION OF PHILIPPINE LAWS, ACTS OF CONGRESS, AND FACTS OF THIS CAUSE—(Continued)

Dates	Philippine Laws	Acts of Congress	Facts
1918			
June 4		Act of Congress of June 4, 1918 ratifies the taxes imposed by Sec. 1459 of Act 2711. (40 Stat. L. 597)	
1920			
March			Judgments herein secured in Philippine Supreme Court.
June 5		Act of Congress of June 5, 1920, ratifies taxes imposed by Sec. 1614 of Act 2657. (41 Stat. L. 1025)	

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 140

JAMES J. RAFFERTY, As Collector of Internal Revenue for the Philippine Islands,

Petitioner,

vs.

COMPANIA GENERAL DE TABACAS DE FILIPINAS,

Respondent.

No. 142

JAMES J. RAFFERTY, As Collector of Internal Revenue for the Philippine Islands,

Petitioner,

vs.

VISAYAN REFINING COMPANY,

Respondent.

BRIEF FOR RESPONDENTS

"Preliminary Observation"

This action was commenced and prosecuted under the Philippine Code of 1916. Section 1721 provides for the action, and in case of judgment, Section 1725 provides for its payment by the Collector of Internal Revenue. Under the circumstances, James J. Rafferty, defendant below, petitioner here, should be continued. Therefore, respondents cannot and do not consent to the substitution proposed by petitioner on p. 1 of his brief.

To the statement of petitioner, respondents would add that in case No. 140, that of Compania General De Tabacas, the answer of petitioner alleges (Record, p. 12), "plaintiff consigned to its agents abroad merchandise," (upon which the tax in question was imposed); and in case No. 142, the Visayan Refining Company case, the answer of petitioner alleges "plaintiff shipped the said 2,268,704 tons of cocoanut oil from the port of Cebu in the Philippine Islands, consigned to its agents in the port of New York, in the United States of America"—(upon which the tax in question was imposed) (Record, p. 7).

In case No. 140 the goods were shipped abroad and the tax thereon imposed, for which judgment was secured, during the months of October, November and December, 1916; and in case No. 142 the cocoanut oil was shipped and the tax thereon imposed for which judgment was secured during the months of November and December, 1916. Thus, the transactions were all in 1916 but subsequent to August 29th, the date of the Autonomy Act prohibiting taxes on exports.

ARGUMENT

I

The Transactions Involved Were Exports

Petitioner argues that shipments from the Philippine Islands to the United States are not "exports from the Philippine Islands," within the meaning of sec. 11 of the Autonomy Act, which prohibits the levy and collection of duties on such exports. This contention, if sound, would lead to the amazing conclusion that Congress permitted the imposition of a burden on trade with the United States which was forbidden to be laid upon trade with foreign countries.

Thus, goods shipped to the United States would be burdened with a tax, while those shipped to other countries would go free. This is directly opposed to the principle upon which trade relations between the United States and its possessions have been most carefully built up. Congress, time and again, has legislated to give preferential markets to goods imported into the United States from the possessions, and to goods exported from the United States into the possessions. Therefore, the interpretation urged by petitioner is in direct contradiction to the policy of Congress from the beginning to the present hour. To assume that Congress intended to place a special burden upon commerce between the Philippine Islands and the United States is to assume Congress intended to drive Philippine commerce away from the United States, and to foreign countries. According to this theory, we are to assume Congress intended to betray the interests of the people, an important part of whose Government it is.

In the Compania General case, No. 140 (Record, p. 12), respondent alleged in its complaint that the goods were "exported," and petitioner admitted in his answer that "plaintiff consigned to its agents abroad, merchandise" (upon which the tax was paid). As petitioner admits the goods were "consigned abroad," it is difficult to see how he can deny they were "exported."

In the Visayan case, No. 142, petitioner alleges: "plaintiff shipped the said * * * oil from the port of Cebu in the Philippine Islands, consigned to its agents in the port of New York in the United States of America," (Record, p. 7). While this language does not use the word "export," nevertheless no more descriptive language of an export could be employed. He alleges, by descriptive language, that the goods were shipped from a port in one country to a port in another. He evidently sought to

bring it under the law placing a tax on goods "consigned abroad"—in other words, an export. He should not deny it that character now.

While the Philippines are not foreign, they are not domestic territory, respecting citizenship, customs, immigration and commerce.

The Insular cases established that the Philippines are not foreign territory, as of course they could not be. Those cases also established that the Philippines are not domestic territory similar to a State or Territory of the United States. Congress has always clearly distinguished the Philippines from purely domestic territory.

Thus, a citizen of the Philippines is not a citizen of the United States, and can become such only by naturalization or Act of Congress. This Court held, and Congress has ever recognized, that the Philippines and the United States constitute two separate territories or countries for the purpose of customs duties. Congress has continually enacted special tariff laws for the Philippines. It is no longer contended in any quarter, that the tariff laws of and for the United States apply also to the Philippines. A separate tariff law for the Philippines has always been the rule. Can it be denied that shipments from one tariff jurisdiction into another are exports?

The Autonomy Act (August 29, 1916) (39 Stat. L. 545), in Section 12, grants general legislative powers to the Philippine Legislature. The grant extends to the enactment of a tariff law, subject to certain restrictions prescribed in Section 10, and to laws regulating immigration and coinage, they to receive the approval of the President of the United States.

Congress has expressly separated the Philippines from the United States in respect to the application of shipping laws.

"The same tonnage taxes shall be levied, collected and paid upon all foreign vessels coming into the United States from the Philippine Archipelago, which are required by law to be levied, collected and paid upon vessels coming into the United States from foreign countries."

(33 Stat. L. 181, Sec. 6, Approved April 15, 1904.)

Also the following:

"The laws relating to entry, clearance, and manifests of steamships and other vessels arriving from or going to foreign ports, shall apply to voyages each way between the Philippine Islands and the United States * * and all laws relating to the collection and protection of customs duties * * * shall apply in the case of vessels and goods arriving from said Islands in the United States."

(32 Stat. L. 691, Sec. 84, Approved July 1, 1902.)

As to laws of the United States affecting coastwise shipping:

"* * * the provisions of law restricting to vessels of the United States the transportation of passengers and merchandise directly or indirectly from one port of the United States to another port of the United States, shall not be applicable to foreign vessels engaged in trade between the Philippine Archipelago and the United States."

(34 Stat. L. 154, Sec. 6, Approved April 30, 1906.)

Shipments between the Philippines and the United States have always been considered exports from the one, and imports into the other.

To catalogue here all the expressions of Congress describing shipments from the Philippines to the United States by the name of exports, would be exceedingly tedious. It will be sufficient to cite several instances illustrative of the principle. (All italics are supplied.)

"All articles, the growth and product of the Philippine Islands, admitted into the ports of the United

States free of duty under the provisions of this Act * * * shall be hereafter exempt from any *export duties* imposed in the Philippine Islands."

(32 Stat. L. pt. I, p. 54, March 8, 1902.)

Again in the Act of March 8, 1902:

"That all articles manufactured in bonded manufacturing warehouses (in U. S.) * * * shall not be charged with duty except the duty levied under this Act upon *imports into the Philippine Islands.*"

(32 Stat. L. 54, Sec. 6.)

Philippine Tariff Act of 1905:

"*Provided,* that the rates of duty levied, collected and paid upon products of the Philippine Islands coming into the United States, shall be less any *export duty or taxes levied, collected and paid thereon upon the shipment thereof from the Philippine Islands* * * *",

also,

"All articles, the growth and product of the Philippine Islands admitted into the ports of the United States free of duty * * * shall be exempt from any *export duties* imposed in the Philippine Islands."

(33 Stat. L. p. 928, Sec. 13, Approved March 3, 1905.)

Philippine Tariff Act of 1909:

"There shall be levied, collected and paid upon all articles * * * entering the jurisdiction of the Philippine Islands from any place or places, including the United States and its possessions * * * the rates of *import* duty which are by this Act specifically provided." (Sec. 1.)

Also:

"That upon the exportation to any foreign country from the Philippine Islands, or the shipment thereof to the United States, there shall be levied, collected and paid thereon, the following *export duties:* Provided further, that all articles the growth and product of the Philippine Islands * * * shall

be exempt from any *export duties* imposed in the Philippine Islands." (Sec. 13.)

Also:

"When *importation* into the Philippine Islands is from a country other than the United States * * * when the *importation* is from the United States of America", (Sec. 18).

(36 Stat. L. 130, Approved August 5, 1909.)

Also from the same Tariff Act of 1909:

"That importation or shipment into the Philippine Islands of the following articles is prohibited:

"(a) Dynamite * * * except in accordance with the enactment of the Philippine Legislature or when *imported* by or for the use of the United States or Insular Governments."

(36 Stat. L. 130, Sec. 3.)

Quoting further from the Philippine Tariff Act of 1909:

"That in addition to taxes imposed by this Act, there shall be levied and collected on goods, wares, or merchandise when *imported* into the Philippine Islands from countries *other than the United States.*" (Sec. 24.)

Also:

"That no drawback shall be paid * * * on account of any articles, goods, wares or merchandise, *exported to the United States of America.*"

(36 Stat. L. 130, Sec. 22.)

From the United States Tariff Act of 1909:

"Free entry of sugar to be *imported into* the United States from the Philippine Islands."

(36 Stat. L. 11, Sec. 5.)

Also:

"That all articles * * * of the Philippine Islands, admitted into the ports of the United States free of duty * * * shall be hereafter exempt from the payment of any *export duties* imposed in the Philippine Islands."

(36 Stat. L. 11, Sec. 5.)

One of the latest Congressional expressions reads:

> "No distilled spirits * * * shall be *imported* into the United States from any foreign country * * * or the Philippine Islands."
> (40 Stat. L. 1106, Approved Feb. 24, 1919.)

It is true, in describing shipments between the Philippines and the United States, Congress frequently has adopted descriptive phrases rather than the words "exports" and "imports." Nevertheless, the specific words have very frequently been used, and on the other occasions, the language is such as to characterize such shipments as *exports* and *imports*. Congress having so frequently expressed itself in respect to such shipments, it must have had such expressions in mind when it enacted Section 11 of the Autonomy Act of August 29, 1916, providing that no export duty shall be levied or collected on exports from the Philippine Islands.

The United States Attorney General holds that goods shipped from the Philippine Islands to the United States are exports.

This exact point has received an elaborate opinion of the Attorney General of the United States. (26 Op. Atty. Gen. 356—1907.)

The Dingley Tariff Act of 1897, 30 Stat. L. 151, provided for a drawback in the following words:

> "Where imported materials on which duties have been paid are used in the manufacture of articles, * * * there shall be allowed on the exportation of such articles a drawback, etc." (Sec. 30.)

The opinion referred to was on the application of the above to materials imported from the Philippines into the United States, and used in the manufacture of goods. The Attorney General held that while the Philippines

are not foreign territory, their situation is such that commodities shipped therefrom into the United States can properly be termed imports, and the drawback should be allowed, saying:

> "both the spirit and the letter of Section 30 are broad enough to include materials brought into this country from the Philippine Islands, and subjected to duty as coming from a territory which, although not a foreign country, has not been permanently incorporated into the United States; (Downes vs. Bidwell, 182 U. S. 244; Dorr vs. United States, 195, U. S. 138, 143), and has been temporarily treated in Congressional legislation as not within the United States for tariff purposes." P. 359.

Also:

> "It is nevertheless clear that under the special legislation relating to the temporary organization of the Philippine Islands, they are treated as territory remaining as yet outside of the United States in a tariff sense for the purpose of imposing duties on articles shipped from them 'into' the United States, analagous to those imposed on imports from a foreign country, and having such status that the term 'imports' can be naturally and properly applied to merchandise brought from them into the United States, a view which is supported by the language used in the opinion of the Court in Downes vs. Bidwell (182 U. S. 244, 287) in reference to the Foraker Act which imposed duties on trade between Porto Rico and the United States under similar conditions to those now existing between the Philippine Islands and the United States, in which it was said that 'the Foraker Act is constitutional so far as it imposes duties upon *imports* from such Island.'"
>
> (26 Op. Atty. Gen. 355, 359, 360.)

The tax of sec. 1614 of Act 2657, in so far as it falls upon export sales, is an export duty.

The percentage tax on merchants' sales is called a "privilege tax on business or occupation" (Act 2657, sec. 1593), and it is urged that a tax imposed upon the privilege of selling merchandise, even in so far as it is measured by the gross price of export sales, is not a duty on exports. This argument has been discredited since *Brown* v. *Maryland*, 12 Wheat. 419. In that case it was decided that a statute requiring importers to pay a license tax for the privilege of selling their imports did, in effect, impose an import duty. By way of illustration Chief Justice Marshall says (p. 445):

> "Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax as Congress might think proper to impose; would Government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the Constitution would expose it, by saying, that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations?"

If a license tax of fixed amount, such as was condemned in *Brown* v. *Maryland*, on the occupation of an exporter is within the prohibition of duties on exports, even less defensible is a tax on such occupation which is directly proportioned to the volume of the business of exporting. In its effect upon the export business of respondents, the tax of sec. 1614 is exactly the same as if an export duty of 1% were frankly levied. Constitutional limitations may not be evaded by indirection, and the validity of a statute is to be determined by its effect, not by its form. *Cummings* v. *Missouri*, 4 Wall. 325; *Henderson* v. *Wickham*, 92 U. S. 259; *Fairbank* v. *United States*, 181 U. S. 283; *Bailey* v. *Alabama*, 219 U. S. 219.

A stamp tax on export bills of lading is an export duty.

Fairbank v. *United States, supra.* But it would be merely tedious to cite further authorities and to argue the principle at length, for this court has recently passed upon the exact question in a case which, despite petitioner's opinion to the contrary, seems to us indistinguishable. *Crew Levick Co.* v. *Commonwealth,* 245 U. S. 360.

Attention is directed to an important feature of this point raised by petitioner, a feature that appertains to his immediately succeeding point. Neither was raised in the courts below; both are here urged for the first time. This Court holds that points available when the case was presented to the Philippine Supreme Court and not there urged, will not be considered upon review here. *De la Rama* v. *De la Rama,* 241 U. S. 154.

Neither of these points, therefore, is properly before this court, but as they can be very easily answered, respondents present the plain arguments against them.

II

The taxes in question were not legalized by the Act of Congress of July 1, 1916.

The judgment under review affects taxes levied and collected under the ostensible authority of sec. 1614 of Act 2657; no others are involved in this case. Act 2657 was approved February 24, 1916, took effect July 1, 1916, and was superseded by Act 2711 October 1, 1917. The percentage tax on sales immediately before July 1, 1916, was found in Acts 2541 and 2622, which took effect January 1, 1916. By a provision inserted in an appropriation Act of July 1, 1916 (39 Stat. L. 286), Congress ratified the internal revenue taxes imposed by Acts 2541 and 2622. It is now contended that this ratification affords sanction for the taxes imposed by Act 2657.

The argument is best answered by quoting the ratification of 1916:

> "That the internal revenue taxes imposed by the Philippine Legislature under the law enacted by that body on December twenty-first, nineteen hundred and fifteen (No. 2541), as amended by the law enacted by that body on February 4, 1916 (No. 2622) * * * are hereby legalized and ratified, and the collection of all such taxes heretofore or hereafter is hereby legalized, ratified and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

Bearing in mind that Act 2657, expressly repealing and superseding Acts 2541 and 2622, had been on the statute books for more than four months and took effect the very day that Congress acted, it requires hardihood to assert that Congress intended to include Act 2657 by specifying Acts 2541 and 2622. "When terms are unambiguous we may not speculate on probabilities of intention." *Insurance Co.* v. *Ritchie,* 5 Wall. 541, 545.

Even if the intention of Congress were open to inquiry, every apparent reason must impel the restrictive interpretation. This court in *Lincoln* v. *United States,* 197 U. S. 419 and 202 U. S. 484, and in *United States* v. *Heinszen & Co.,* 206 U. S. 370, had clearly marked the difference in effect between a specific and a general ratification. Congress had abolished Phillippine export duties by Act of October 3, 1913, (38 Stat. L. 193), and forbade that method of taxation in the Autonomy Act of Aug. 29, 1916. It may well be supposed that the ratification of July 1, 1916, (in so far as it affected export duties), was conceded only by way of exception to the general policy of Congress and only because the statutes validated by the ratification were already superseded. To condone a temporary excess of authority

in the past was one thing; to grant increased authority for future exercise was quite another.

Since 1902 Philippine import and export duties have been prescribed by Congress, and the invasion of this reserved function by various so-called internal revenue laws of the Philippine Legislature has led to a series of curative acts in which Congress has invariably employed the formula of specific ratification. 35 Stat. L. 615; 38 Stat. L. 1143; 39 Stat. L. 286; 40 Stat. L. 597; 41 Stat. L. 1025. As each Philippine statute took effect, whether we call it the re-enactment of an old law or the enactment of a new, it became the collector's authority to the exclusion of its predecessor, and Congress in every instance restricted its ratification to the taxes imposed "under" or "in" a specified act, and to the collection of "such taxes." If Congress by the Act of July 1, 1916, had authorized the re-enactment of provisions similar to those specifically ratified, why the superfluous ratifications of 1918 and 1920? And if in 1918 and 1920 Congress was actuated, not by an appreciation of necessity, but merely by a purpose to dispel doubts, why the consistent adherence to the formula of specific ratification?

The taxes in question were not legalized by the Act of Congress of June 4, 1918.

The taxes affected by the judgment herein were levied and collected under the ostensible authority of Act 2657, after the prohibition of export duties by sec. 11 of the Autonomy Act, and while that prohibition stood unimpaired. Act 2657 was superseded October 1, 1917, by Act. 2711, under whose ostensible authority similar taxes were thereafter levied and collected. By a provision of the appropriation act of June 4, 1918 (40 Stat. L. 597), Congress ratified the taxes imposed by Act 2711. Petitioner

argues that this ratification legalized the taxes imposed by Act 2657.

Again the language of Congress affords the conclusive answer:

> "The taxes imposed by the Philippine Legislature in section fourteen hundred and fifty-nine of the act numbered twenty-seven hundred and eleven, enacted by that body on March tenth, nineteen hundred and seventeen, are hereby legalized and ratified, and the collection of all such taxes heretofore or hereafter is legalized, ratified and confirmed hereby as fully to all intents and purposes as if the same by prior Act of Congress specifically had been authorized and directed."

What has been said above of the ratification of 1916 is applicable to this Act of 1918. If possible, the reasons for the strict interpretation of the later enactment are more convincing. There is not only the presumption that Congress was advised of Act 2657, but the research of petitioner (brief, p. 27) shows that the situation was fully explained by the Governor-General, through the Secretary of War. Congress was advised that the Philippine Government had collected in defiance of Congress about $2,000,000 of export duties under Act 2657 and desired the sanction of Congress for the retention of such collections. The response in the form of a ratification limited to taxes "imposed in section 1459 of the act numbered 2711," is as clear a denial of the appeal of the Governor-General as could be framed. There is no repeal of sec. 11 of the Autonomy Act, and the evident purpose is to grant a limited exception rather than to abandon the principle of the prohibition of export duties. Congress may have been disposed to grant relief from the time when the Philippine Government, by the Governor-General's letter, evidenced a law-abiding sentiment; this must have been, as

petitioner shows, about October 1, 1917, which was moreover a convenient starting-point. But Congress must have been reluctant to stultify wholly the prohibition of export duties of the Autonomy Act, and wholly to condone the impudent disregard of the effect of that prohibition upon sec. 1614 of Act 2657.

This series of enactments of the law placing a tax on merchandise sales, may be considered each an amendment of its predecessor, as each differed in some important particular from its predecessor. Act No. 2541 amends Act No. 2339 by repealing the exemption of exports. Act. No. 2622 amends Act. No. 2541 by extending its terms to "consignments." Act No. 2657, Sec. 1614, repeals Act No. 2622 and amends its terms by introducing the word "abroad" so as to read "consignments abroad." Had Congress intended to rectify on June 4, 1918, all the taxes theretofore imposed and collected, it would have ratified those imposed under the first enactment, with all "amendments thereof." Congress did no such thing. It followed its uniform custom of ratifying the taxes collected under a single enactment, specifically naming it.

III

The Act of Congress of June 5, 1920, can not have the effect of confiscating the judgments under review.

The Compania General case, No. 140, was commenced in the Court of First Instance of Manila on January 23, 1917. (Record, p. 9.) Judgment in favor of respondent was rendered by that Court November 26, 1917. Both parties appealed to the Supreme Court and judgment there was given in favor of respondents, March 16, 1920. (Record, p. 31.)

The Visayan Refining Co. case, No. 142, was com-

menced in the Court of First Instance of Manila, on January 20, 1917 (Record, p. 5). Judgment in favor of respondent was entered by that Court on November 26, 1917. Both parties appealed to the Supreme Court, and therein judgment was rendered in favor of respondent, March 18, 1920. By these judgments respondents became entitled to recover from petitioner the amounts which petitioner had exacted as taxes under the ostensible authority of section 1614 of Act 2657. June 5, 1920, Congress in an appropriation act (41 Stat. L. 1025) provided:

> "The taxes imposed by the Philippine Legislature in section 1614 of the Act numbered 2657, enacted by that body on February 24, 1916, are legalized and ratified, and the collection of all such taxes made under or by authority of such Act of the Philippine Legislature is legalised, ratified, and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

Petitioner contends that this enactment is effective, not only to validate the collection of such taxes as were paid without protest, not only to defeat pending actions for the recovery of taxes exacted without prior authority —but also to reverse, annul, or confiscate, the judgment herein reviewed.

For the purpose of argument under this head it must be assumed that the ratification intends the effect attributed to it by petitioner: To operate retrospectively; to supply for the period of the controverted collections the authority which at the time was not only withheld from, but specifically denied to, the Philippine government and its officials; to apply, not only to collections undisputed or still in controversy, but to obligations merged in judgment; concretely, to relieve and dis-

charge James J. Rafferty from his judgment debt to respondent. Later it will be argued that the ratification may not be so construed; but the present question is whether Congress had power to accomplish what petitioner claims—whether the Act, with petitioner's construction, is valid.

It is significant that the diligence of petitioner's counsel has produced no reported case wherein a curative statute has been held effective to divest a right reduced to judgment. (Note the admission of failure at p. 46 of brief). The decisions upholding retrospective statutes to cure irregularities as against claims not reduced to judgment, of which many are quoted or cited by petitioner, do not require particular notice. All are distinguishable in that they do not involve the overthrow of judgments, and most of them present other obvious and vital differences that make them inapplicable herein. None of them goes so far toward being in point as *United States* v. *Heinszen & Co.*, 206 U. S. 370, and if, as respondents will endeavor to show, that case is not controlling, all the others fall with it.

The proposition that a statute may divest rights established by a judgment is so abhorrent to our fundamental principles and to natural justice, as well as to familiar constitutional limitations, that there are few instances in our jurisprudence where the attempt has been made and passed upon. Nevertheless, there is plain condemnation of the theory in the decisions of this Court.

> "It is not within the power of a legislature to take away rights which have been once vested by a judgment." *McCullough* v. *Virginia*, 172 U. S. 102, 123.
>
> "It is undoubtedly true that legislatures cannot set aside the judgments of courts." *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 478.

"But it is urged, that the Act of Congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff. This, as a general proposition, is certainly not to be denied, especially as it respects adjudication upon the private rights of parties. When they have passed into judgment the right becomes absolute and it is the duty of the court to enforce it. * * * Now, we agree, if the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of Congress." *Pennsylvania* v. *Wheeling & B. B. Co.*, 18 How. 421, 431.

In the State courts there is an unbroken line of authorities denying the power of the legislature to vacate judgments, to grant new trials, or in the form of curative statutes to divest judgment rights. In these cases the condemnation of the statute is generally based upon legislative invasion of judicial power, but in all it might equally have been said that the statutory assault upon vested rights was not due process of law, and in some of the decisions this is recognized.

Haley v. *City*, 68 Penn. St. 45
Taylor v. *Place*, 4 R. I. 337
Sanders v. *Cabaniss*, 43 Ala. 184
Lawson v. *Jeffries*, 47 Miss., 702
Griffin v. *Cunningham*, 20 Gratt. 54

While *United States* v. *Heinszen & Co., supra*, holds that a Congressional ratification may destroy a mere right of action, practically overruling in this respect *De Lima* v. *Bidwell*, 182 U. S. 1, yet the reasoning, by distinction, compels the conclusion that a claim reduced to judgment is immune. In the quotation the italics are supplied.

"Nor does the mere fact that, at the time the ratify-

ing statute was enacted, this action *was pending* for the recovery of the sums paid, cause the statute to be repugnant to the Constitution. The mere commencement of the suit did not change the nature of the right. * * *

"Considering how far the bringing of actions would operate to deprive government of the power to enact curative statutes which, if the actions had not been brought, would have been unquestionably valid, Cooley, in his Constitutional Limitations, says (7th ed. p. 543):

'"Nor is it important, in any of the cases to which we have referred, that the legislative act which cures the irregularity, defect, or want of original authority, was passed after suit brought, in which such irregularity or defect became matter of importance. The bringing of suit vests in a party no right to a particular decision (cases cited); and his case must be determined on the law as it stands, not when the suit was brought, but *when the judgment is rendered.* (Cases cited.)'" (p. 387.)

The judgments herein are final, to the extent of creating a property right that cannot be divested by subsequent legislation.

It is immaterial that the judgments may not be immediately executed because of the granting of a writ of certiorari herein. The immunity of respondents' judgments from legislative confiscation does not depend upon their finality in the sense of not being subject to judicial review. If the interposition of this court had the effect of vacating the judgments and bringing the causes here to be tried *de novo*, the case might, arguably, be different; but upon the allowance of the writ, the judgment is reviewed "as if brought up by writ of error," and it is precarious only to the extent that error may be found. If the judgment is declared free from error, its affirmance by this court will in no way enhance its value or change its character. The ultimate question is

whether the judgments are "property" of respondents, such as may not be taken without due process; the review herein is an examination of respondents' title to the property—not a proceeding from which such title may arise. A judgment creditor in a case reviewable for error may be divested of his property in the judgment, but only by "due process of law"—which judicial reversal is, and legislative confiscation is not.

Heinszen Case further distinguished.

There is a fundamental difference between the ratification sustained in *United States* v. *Heinszen & Co., supra,* and the ratification asserted by petitioner herein, in that the one supplied a mere *absence* of prior authority, while the other is invoked to cure an express *denial* of authority. This difference is inferentially recognized in the *Heinszen* opinion, where the court says (p. 382):

> "Where an agent, *without* precedent authority, has exercised in the name of the principal a power which the principal *had the capacity to bestow*, the principal may ratify and affirm the unauthorized act, and thus retroactively give it validity when rights of third parties *have not intervened*, is so elementary as to need but statement." (Italics supplied.)

It is equally obvious that where the principal has denied authority to his agent and third parties have relied upon such denial, the principal may not thereafter retroactively give validity, in prejudice of such third parties, to acts of the agent in contumacious exercise of the power denied.

The principles involved are those of agency, as the *Heinszen* decision makes clear, and the distinction may be made plain by a simple illustration. If my pretended

agent, without precedent authority, collects rents from an occupant of my house, I may ratify such collection; but if I have agreed with my tenant that his rent shall be $100 per month, and my agent compels him to pay under duress and protest $150 per month, no ratification on my part would validate the extortion. So, when Congress enacted "that no export duties shall be levied or collected on exports from the Philippine Islands," it deprived itself for so long as the prohibition stood unrepealed of "the capacity to bestow" power to collect such duties. The prohibition was revocable at the will of Congress, but so long as it remained in force as a restriction on the Philippine Government and its tax-collectors, third parties enjoyed the right of exemption from export duties, terminable, but not subject to be retroactively divested.

Mr. Justice Harlan, concurring in the majority opinion in the *Heinszen* case, says (p. 391):

> "Interpreted in the light of previous and pending litigation, this act should be construed as denying the authority of any court to take cognizance of a suit brought against the United States to recover any claim arising out of such collections. The act should, therefore, be construed as withdrawing the consent of the United States to be sued on account of claims of that character. In this view, it was error to render judgment against the United States, whatever might be the liability of the Collector, if his exaction of the duties in question was without authority of law. Upon this ground alone and without considering any of the questions discussed in the opinion of the court, I concur in the judgment of reversal."

The distinction is clear between an Act of Congress withdrawing the government's consent to be sued, and an Act which pretends to relieve one individual from his judgment debt to another.

Respondents' vested rights in their judgments are analogous to vested rights secured by exemption from taxation.

There is no more familiar example of vested rights immune from a taking without due process than exemption from taxation. Such exemption is commonly in perpetuity or for a fixed period, but it might imaginably be granted without term. Can it be doubted that an attempt to take away such exemption retrospectively would be invalid? Whether such an exemption is definite or precarious, it is property and has been held by this Court to be protected by the Constitution against Congressional action. In the case of *Choate v. Trapp*, 224 U. S. 665, it appears that Congress by the Curtis Act of 1898, amended in 1902, provided for the allotment of tribal lands of Indians and for exemption of the individual holdings from taxation. In 1908 an Act of Congress pretended to authorize taxation of the same lands. The State of Oklahoma attempted to impose taxes and the Indians resisted. This Court, by Mr. Justice Lamar, says (p. 673):

> "The patent issued in pursuance of those statutes gave the Indian as good a title to the exemption as it did to the land itself. Under the provisions of the 5th Amendment there was no more power to deprive him of the exemption than of any other right in the property."

To the same effect is the very recent case of *Ward* v. *Love County*, 253 U. S. 17. Would not the result have been the same if the exemption from taxation had been indefinite and revocable, and Congress had attempted to ratify taxes imposed by the State before the repeal of the exemption?

Even in the Philippine Islands no person may "be deprived of life, liberty or property without due process of law."

From a misunderstanding of the "Insular Cases" and certain subsequent decisions of this Court there has arisen a wide-spread belief that Congress has power unlimited to legislate for the Insular Possessions; that none of the safeguards and limitations of the Constitution of the United States protect lives, liberties and property in the Possessions against Congressional action. This belief has no foundation in the decisions of this Court, and none in principle.

If there is no decision of this Court affirmatively applying any guaranty or limitation of the Constitution in the Philippine Islands or Porto Rico, the reason is plain; the occasion has not arisen. No case has been presented in this court wherein Congress legislating for the Possessions, has attempted to pass a Bill of Attainder, to grant a Title of Nobility, to prohibit the free exercise of religion, nor, without due process of law, to deprive any person of life, liberty or property.

In cases wherein insular legislatures have encroached upon personal rights, the decisions have been based upon the guaranties of Congressional organic laws, and the Court has avoided as unnecessary determining whether the corresponding provisions of the Constitution would have been applicable. Thus in *Kepner* v. *United States,* 195 U. S. 100, Justice Day says (p. 124): "It is not necessary to determine in this case whether the jeopardy provision in the Bill of Rights would have become part of the law of the Islands without Congressional legislation."

On the other hand, the power of Congress over the Insular Possessions is derived from the same provision of the Constitution—Art. IV, Sec. 3, par. 2—which supported the jurisdiction of Congress in the Territories

which later became States. And it has been held, as we shall see, that in legislating for those Territories Congress was not wholly exempt from constitutional limitations.

It has been held that the Uniformity Clause of Art. 1, Sec. 8, does not apply to duties imposed by Congress in the Possessions, because the section requires uniformity only "throughout the United States," and the Possessions are not a part of the United States. *Downes* v. *Bidwell,* 182 U. S. 224. But in that case even the majority of the Court conceded that the Constitution contains limitations which operate upon the power of Congress wherever exercised; and it is apparent that the decision would have gone the other way if the requirement of uniformity had been stated in the Constitution without the qualifying phrase.

It has been held, also, that the right to trial by jury conferred by the sixth amendment does not extend to the Territories and Possessions. *Hawaii* v. *Mankichi,* 190 U. S. 197; *Dorr* v. *United States,* 195 U. S. 138. But in the Mankichi case Justice Brown says for the Court (p. 217): "We would even go farther, and say that most, if not all, the privileges and immunities contained in the Bill of Rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case (indictment by grand jury and trial by jury) are not fundamental in their nature but concern merely a method of procedure * * *." And Justices White and McKenna, concurring, point out that Hawaiian laws must yield, "Where they were inconsistent with those fundamental provisions of the Constitution which were, by their own force, applicable to the territory with which Congress was dealing."

In the Dorr case, Justice Day says:

> "The exercise of the power expressly granted to govern the territories is not without limitations. Speaking of this power, Mr. Justice Curtis, in the case of *Scott* v. *Sandford*, 19 How. 614, 15 L. ed. 787, said:
>
> " 'If, then, this clause does contain a power to legislate respecting the territory, what are the limits of that power?
>
> " 'To this I answer that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that in the exercise of the legislative power, Congress cannot pass an *ex post facto* law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution.' " (p. 142).
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> * * * * * * *
>
> "The limitations of this power were suggested by Mr. Justice Curtis in the *Scott Case*, above quoted, and Mr. Justice Bradley in the *Church of Jesus Christ of L. D. S.* v. *United States*, 136 U. S. 1, 34 L. ed. 481, 10 Sup. Ct. Rep. 792, said:
>
> " 'Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions.' " (p. 146.)

In *Downes v. Bidwell*, 182 U. S. 262, Justice Brown says, for the majority of the Court:

> "To sustain the judgment in the case under consideration, it by no means becomes necessary to show that none of the articles of the Constitution apply to the island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time

or place, and such as are operative only 'throughout the United States' or among the several States.

"Thus, when the Constitution declares that 'no bill of attainder or *ex post facto* law shall be passed,' and that 'no title of nobility shall be granted by the United States,' it goes to the competency of Congress to pass a bill *of that description.* Perhaps the same remark may apply to the 1st Amendment, that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble and to petition the government for a redress of grievances.' We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local application." (p. 276.)

* * * * * * *

"We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. * * *" (p. 282.)

In the same case Mr. Justice White, for himself, and for Mr. Justice Shiras and Mr. Justice McKenna, concurring says:

"While, therefore, there is no express or implied limitation on Congress in exercising its power to

create local governments for any and all of the territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended" (p. 290).

* * * * * * *

"Undoubtedly there are general prohibitions in the Constitution in favor of the liberty and property of the citizen, which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts." (p. 294).

The grounds of dissent in the Insular cases show that *all* of the Justices were agreed that the "general prohibitions" in support of "natural rights" limited the power of Congress to legislate for the Possessions.

Among these effective limitations is certainly that of the 5th Amendment:

"No person shall * * * be deprived of life, liberty, or property, without due process of law."

In *Fletcher* v. *Peck*, 6 Cranch 87, the State of Georgia had authorized by statute the sale of state lands. After conveyances had been made by virtue of this statute the State Legislature by another statute undertook to annul and rescind the first law and to avoid the titles acquired by its authority. The case involved the prohibition of Art. I, sec. 10, whereby the States are forbidden to impair the obligation of contracts. But the opinion of Chief Justice Marshall is of especial interest for our present inquiry.

"Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held? (p. 135).

"The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.

"The correctness of this principle, so far as respects general legislation, can never be controverted. But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power * * *

"It may well be doubted whether the nature of society and of government does not prescribe some limits to this legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?

"To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection.

* * * * * * *

"The validity of this rescinding act, then, might well be doubted were Georgia a single sovereign power * * * (p. 136).

* * * * * * * * * * *

"The state legislatures can pass no *ex post facto* law. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law annul-

ling the title by which he holds that estate? The Court can perceive no sufficient grounds for making this distinction. * * * " (p. 138).

In the same case Mr. Justice Johnson, concurring, denies the application of Act I, Sec. 10, and puts his assent squarely on the ground of general principles:

"I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things; a principle which will impose laws even on the Deity." (p. 143).

Authorities might be multiplied, but there will hardly be dissent from the principle. The confiscation of private property by legislation, "without due process of law," is so abhorrent to the whole spirit of the Constitution, that if, as the *Insular Cases* so strongly suggest, there are limitations which Congress may not disregard in legislating for the territories, the "due process clause" is one of them. Indeed, it is so specified by Justice Brown in Downes v. Bidwell, *supra*—"The right to * * * individual property * * * to due process of law."

IV

The ratification by Act of June 5, 1920, covers only the period between July 1 and Aug. 29, 1916.

It will be convenient here to review the pertinent facts and dates. Act 2657 was approved in February, 1916, and took effect July 1, 1916. Up to that time, and until August of the same year, the Philippine government lacked power to impose export duties, but there was no express denial of such power. Nevertheless, Sec. 1614 of Act 2657 purported to apply the 1% merchants' tax to export sales and consignments. The Autonomy Act was approved by Congress August 29, 1916, and in sec. 11 provided, "That no export duties shall be levied or collected on exports from the Phil-

ippine Islands," thus repealing *pro tanto* Act 2657, for, as Chief Justice Marshall says in *M'Culloch* v. *Maryland*, 4 Wheat. 316, 425:

> "A law, absolutely repugnant to another as entirely repeals that other as if express terms of repeal were used."

The amounts covered by the judgment herein were levied and collected after August 29, 1916, and under the ostensible authority of the repealed provisions of Act 2657. In 1920 Congress enacted the ratification, which, for convenient reference is here again quoted:

> "The taxes imposed by the Philippine Legislature in section 1614 of the Act numbered 2657, enacted by that body on February 24, 1916, are legalized and ratified, and the collection of all such taxes made under or by authority of such Act of the Philippine Legislature, is legalized, and ratified, and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

Does this provision repeal the prohibition of sec. 11 of the Autonomy Act in so far as the latter affected sec. 1614 of Act 2657? Not expressly. But does it work such repeal by implication, as being a later statute "absolutely repugnant to" the earlier? Such a result is to be avoided if possible; if more than one construction is applicable, that must be preferred which will enable the two statutes to stand together.

> "Repeals by implication are not favored. This means that it is the duty of the Court to so construe the acts, if possible, that both shall be operative." Lewis' Sutherland, Statutory Construction, sec. 247.
>
> "The intention to repeal * * * will not be presumed, nor the effect of repeal admitted, unless the

inconsistency is unavoidable, and only to the extent of the repugnance." id., id.

25 R. C. L. 918, secs. 169, 170.

We are considering a ratification. *In United States* v. *Heinszen,* 206 U. S. 380, at page 384, Mr. Justice White adopts the statement from *Mattingly* v. *District,* 97 U. S. 687, 690:

> "The ratification, if made, was equivalent to an original authority, according to the maxim, *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.*"

And Congress in the statute itself defines the effect to be given to its action: "As fully to all intents and purposes as if the same had, by prior Act of Congress, been specifically authorized and directed." Surely it can not be thought that ratification is *more* effective than prior authorization.

Let us apply the test prescribed by Congress. Suppose that there had been in force in February, 1916, an Act of Congress which "specifically authorized and directed" the enactment of sec. 1614 of Act 2657. Then the export duties imposed by that section would have been perfectly valid until August 29, 1916, when Congress directed that they should no longer be levied or collected; after that date they would have been invalid. Such is the exact effect of the ratification; it supplies the original authority, which theretofore was lacking for sec. 1614 of Act 2657 in its application to exports, for so long as that section was effective; but it does not prolong the life of the section nor validate collections which, being made after August 29, 1916, were not "under or by authority of" the provisions then repealed.

It may be unusual, but it is by no means impossible, nor is it unprecedented, to ratify for the term of its ex-

istence a statute which has been repealed. Congress by Act of July 1, 1916, ratified Acts 2541 and 2622, which had died by repeal the day before. (See II, *supra.*) The situation would be exactly the same if the repeal and ratification had been synchronous; if the ratification of 1920 had been incorporated in the Autonomy Act together with the prohibition of export duties, the two provisions would have fitted together perfectly, the one operating retrospectively and the other prospectively.

Petitioner's sole argument against the interpretation which respondent puts upon the ratification of 1920 is that the statute provides for the legalization of the collection of *"all* such taxes." (Brief, p. 59.) Counsel's italics are not carried far enough—Congress legalized the collection of "all *such* taxes (i. e., those imposed by section 1614 of Act 2657) made *under* or *by authority of such Act*" and only *"as* fully—as if the same had by prior Act of Congress been specifically authorized and directed." The amounts which James J. Rafferty has been ordered to repay to respondents are not "taxes imposed * * * in section 1614 of the Act numbered 2657", nor were they collected "under or by authority of such Act," because that section, in so far as it imposed export duties, had been repealed or annulled by the sovereign power of Congress and no longer afforded authority for the collection of export duties. Whatever authority Mr. Rafferty may have pretended for the controverted exactions, in reality he had none.

In this respect an interesting analogy is afforded by another ratification act, as construed in *Lincoln* v. *United States,* 202, U. S. 484. In that case the disputed collections, import duties, had been collected, under the ostensible authority of an order of the President, after the ratification of the Treaty of Paris. The Court held that

the President's powers, without Congressional support, ceased with the war. Congress, by sec. 2 of the Act of July 1, 1902, ratified "the actions of the authorities of the Government of the Philippine Islands taken in accordance with the provisions of said order." It was held that the President's order, having no authority except the war power, was limited to the duration of the war as clearly as if so expressed; that import duties collected after the ratification of the treaty were, therefore, not "in accordance with the provisions of said order"; that, while Congress might have ratified such collections (as was subsequently done), the terms of the statute under consideration only affected collections made during the life of the President's order.

> "The statute does not ratify all actions or all collections of taxes, as it easily might have done, but only actions in accordance with the order." (p. 498.)

So, in these cases, the authority ratified is that of sec. 1614 of Act 2657, which, in respect to export duties, ceased on August 29, 1916, by virtue of sec. 11 of the Autonomy Act; and the ratification by its terms is limited to actions "under or by authority of" the section specified. Congress might easily have said that the ratification was of *all* collections of export duties, but chose to restrict the validation to such as were made by authority of section 1614.

Here, as in the *Lincoln* case, "Every consideration requires that the ambiguous language of the act should not be stretched beyond the exact and literal meaning of the words" (p. 499). Here, as there, the ratification has a proper and useful application in its restricted interpretation; here, as there, there were pending actions which Congress may not be presumed to have intended to destroy in the absence of clear expression of such intention—a principle of greater force herein because the actions were

not merely pending, but reduced to judgment. In *United States* v. *Heinszen & Co., supra,* the court, citing the Lincoln case, says (206 U. S. at p. 390):

> "In the course of the opinion, in answering the argument that the alleged ratifying statute would be meaningless unless it were held applicable to the particular duties in controversy, it was pointed out (202 U. S. p. 499) that there were duties levied and collected other than those in controversy, to which the act clearly applied, and 'that question (as to them) was put at rest by this ratification.' Further in calling attention to the ambiguity in the ratifying statute relied upon and the resulting doubt whether it embraced all duties, it was pointed out that the fact that actions were pending at the time of the ratifying act lent cogency to the view that, if Congress had intended by the ratification to affect them, it would have explicitly so declared. On this subject the Court said (p. 498):
>
> "'This construction is favored by the consideration that the suits had been begun when the Act of July 1, 1902, was passed, and that, even if Congress could deprive plaintiffs of their vested rights in process of being asserted (Hamilton v. Dillin, 2 Wall. 73), still it is not to be presumed to do so on language which, literally taken, has a narrower sense.'"

The conclusion that Congress intended the more restricted effect of the ratification of 1920 is further impelled by the known circumstances. In 1918 Congress was urged by the Philippine Government to ratify Act 2657 as well as Act 2711, and refused (petitioner's brief, p. 27; *supra,* p. 14). In 1920 the plea for ratification must have embraced the period involved in this cause (and in other cases still pending in the Philippine Courts). This court had pointed out the restricted scope of the ratification in the *Lincoln* case, and had added emphasis by giving broader effect to the ratification in the *Heinszen*

case. When, with all this information and advice, Congress chose to employ the formula construed in the *Lincoln* case, failed to declare explicitly its purpose to affect pending actions or judgments, refrained from ratifying *all* collections—there can be only one inference. Congress intended to sanction only the export duties collected *without* authority and before the Autonomy Act—not such duties collected in *defiance* of the prohibition while the latter stood unimpaired.

It has been argued (III *supra*), that the construction given the ratification of 1920 by petitioner would violate the guaranty of due process of law. If that contention is sound, there arises a strong presumption in favor of such a construction as will avoid the result of unconstitutionality. (Lewis' Sutherland, Statutory Construction, sec. 83; 1 Fed. Stats. Ann., p. 107; *St. Louis* v. *Arkansas*, 235 U. S. 350.) But if both constructions are possible, and both constitutional, that one must be preferred which is consonant with fairness and natural justice. Retrospective taxation, particularly on gross income, has necessarily an element of unfairness. But in this case there is more than that—sec. 11 of the Autonomy Act afforded to Philippine exporters a guaranty upon which, so long as it stood unrepealed, they were perfectly entitled to rely in making their prices and their contracts. It would have been indecent for them even to suspect that Congress would stultify its declaration and retrospectively sanction the impudent disregard by Philippine officials of the Congressional prohibition. To ratify in 1920 taxes on gross income of 1916-1917, which had been expressly prohibited during that period, would be outrageous.

> "The supposition that the government will not pay its debts or will not do justice is not to be indulged." *Gibbons* v. *United States*, 8 Wall. 269, 274.

V.

If Petitioner's collection of the taxes was unlawful, the award of interest was not error.

If petitioner unlawfully exacted the payments covered by the judgment under review, then his subsequent retention of the money was equally unlawful. The remedy for the initial wrong is repayment of the principal; the remedy for the subsequent and continuing wrong is the payment of interest.

The Philippine law forbids the courts to enjoin the collection of disputed taxes. Act 2711, sec. 1578; Act 2657, sec. 1720. The only redress of an aggrieved taxpayer is by payment under protest, and, upon denial of administrative relief, recovery by suit. *Churchill* v. *Rafferty*, 32 Phil. 593. If Philippine statutes are construed to limit such recovery to the principal, to deny compensation for loss of use of money unlawfully taken, they must be held invalid for violation of the provisions of the Autonomy Act, Act of Congress of August 29, 1916.

If the Philippine government might not impose export duties, neither might it require of exporters involuntary and uncompensated loans. If the Philippine government had no power to collect as taxes the sums involved herein, may retain them for years and be discharged of all obligations by repayment without interest, then private property will have been taken for public use without just compensation; for the use of money is property as well as the money itself.

The Philippine Legislature could not relieve the petitioner of his personal obligation to make good the damage resulting from his unauthorized acts. A statute may properly provide that interest shall not be recoverable on voluntary loans in the absence of stipulation to

the contrary; but it is quite another thing to deny compensation for the loss of use of money taken unlawfully and under duress. If petitioner may discharge his obligation by mere repayment of principal, then the law so providing deprives respondent of the use of its money—which is property—without due process of law.

Section 1579 of Act 2711, invoked by petitioner, authorizes an action against the Collector of Internal Revenue, after the performance of certain conditions, to recover "without interest" sums unduly exacted as internal revenue taxes. Given prospective application, and limited to the special remedy which it affords, the section with its limitation may be justified. If, however, it is so construed as to apply to an action to recover sums exacted under the authority of a former law, superseded by Act 2711, which authorized recovery with interest, section 1579 contravenes the Autonomy Act. The Philippine Supreme Court has held that section 1579 is inapplicable herein, and the presumption is strong in favor of such a construction to avoid the result of unconstitutionality. Lewis Sutherland, Statutory Construction, sec. 83, 1 Federal Statutes Annotated, p. 107; *St. Louis* v. *Arkansas*, 235 U. S. 350.

In favor of the construction adopted by the Court below, as against the theory of petitioner which would deny compensation for the unlawful retention of respondent's funds, is the rule that the legislature is presumed not to have intended to work hardship or injustice. Lewis' Sutherland, op. cit., secs. 488, 490; 1 Fed. Stats. Ann., p. 101; *Lionberger* v. *Rouse*, 9 Wall., 475.

The question turns on local law.

The award of interest by the Philippine Supreme Court is based entirely upon the construction and ap-

plication of Philippine law. The general rule in the Islands is set out in Art. 1108 of the Civil Code, cited by the Court below (Record, p. 32):

> "Should the obligation consist in the payment of a sum of money, if the debtor should become in default, the indemnity for damages, in the absence of a stipulation to the contrary, shall consist in the payment of the interest agreed upon, or, should there be no agreement, in the payment of interest at the legal rate.
>
> "Until another rate is fixed by the government, the legal rate of interest shall be six per cent per annum."

That this provision applies to the obligation to repay arising from unlawful exactions of tax collectors, has been determined by the Supreme Court of the Philippine Islands, not only in the instant cases, but in other decisions. *H. E. Heacock Co.* v. *Insular Collector*, 37 Phil., 970; *Hongkong & Shanghai Banking Corporation* v. *Rafferty*, 39 Phil., 145; *Palanca* v. *City*, XVIII Official Gazette, No. 89, p. 2725.

In the Court below the decision was unanimous in awarding interest. This circumstance makes strong the presumption which attaches to a determination of Phillipine law by the highest court of the Islands.

> "We follow and sustain the local law as applied by the court below unless we are constrained to the contrary by a sense of clear error committed." *Villanueva* v. *Villanueva*, 230 U. S., 293, 299.

Attention is here directed to the fact that the taxes for which respondents secured judgments were imposed prior to the taking effect of Sec. 1579 of Act 2711, and at a time when interest was allowable. That section took effect Oct. 1, 1917. Furthermore, the suits herein were started in January, 1917, or nine months before this Act took effect.

Therefore, as regards interest, the rights of respondents should be determined by the law in force at the time the taxes were collected, and the suits to recover were started.

These cases are governed by Section 1721 of Act 2657, the Administrative Code of 1916, in force when the taxes were collected and when the suits were brought, which reads:

> "Sec. 1721. *Recovery of tax paid under protest.* When the validity of any tax is questioned, or its amount disputed, or other question raised as to liability therefor, the person against whom or against whose property, the same is sought to be enforced, shall pay the tax under instant protest, or upon protest within ten days, and shall thereupon request the decision of the Collector of Internal Revenue. If the decision of the Collector of Internal Revenue is adverse, or if no decision is made by him within six months from the date when his decision was requested, the taxpayer may proceed, at any time within two years after payment of the tax, to bring an action against the Collector of Internal Revenue for the recovery of the sum alleged to have been illegally collected, the process to be served upon him, upon the provincial treasurer, or upon the officer collecting the tax."

Section 1725 of the same Act reads:

> "Sec. 1725. Satisfaction of judgment recovered against treasurer or other officer.—When an action is brought against any revenue officer to recover damages by reason of any act done in the performance of official duty, and the Collector of Internal Revenue is notified of such action in time to make defense against same, through the Attorney-General, any judgment, damages or costs recovered in such action shall be satisfied by the Collector of Internal Revenue upon approval of the Department head, or if the sum be paid by the person sued, shall be repaid or reimbursed to him.

"No such judgment, damages, or costs shall be paid or reimbursed in behalf of a person who has acted negligently or in bad faith, or with wilful oppression."

This is not an action against the Government.

In the case of a disputed internal-revenue tax of the United States the protestant taxpayer may sue the United States by authority of the Tucker Act, or he may sue the collector personally. If he elects the former remedy, he takes it with the limitations which are imposed upon the waiver of the sovereign's immunity; but if he chooses to sue the collector, the indirect interest of the United States and even the statutory assurance that the Treasury will respond for the judgment do not preclude a full recovery with interest and costs.

"The distinction appears to be between suits to recover moneys illegally exacted as taxes and paid under protest, brought against collectors, although the judgment is not to be paid by the collector, but directly from the Treasury, and suits against the United States." *Viuda* v. *Rafferty*, 37 Phil. 957, 965.

The defendant herein is James J. Rafferty, who was Collector of Internal Revenue during the period of the controverted collections; his office enabled him to coerce the payments.

"Collector of Internal Revenue" is the title of the chief of the Bureau of Internal Revenue (Act 2711, Sec. 1421). Internal Revenue taxes may be collected by deputies and subordinates (id., sec. 1426), or by the "Collector of Internal Revenue" himself, for example in his *ex-officio* capacity of City Assessor and Collector of Manila (id., sec. 1422). In the absence of statutory authority an aggrieved taxpayer might not sue the Philippine government nor any of its agents in his official capacity, but must rely entirely upon the personal responsibility of the officer who had

exacted the payment unduly. But since 1914, at least, the internal-revenue law has authorized an action against the "Collector of Internal Revenue," "the process to be served upon him, upon the provincial treasurer, or upon the officer collecting the tax" (Act 2711, sec 1579; Act 2657, sec. 1721; Act 2339, sec. 140). For this action it does not matter whether the protested payment had been made to the chief of the bureau or to a subordinate; the liability imposed upon the defendant is derived from the statute alone and depends upon the official position of the defendant.

As in the United States R. S. sec. 989 recognizes the personal liability of collectors and provides for their protection against personal judgments, so sec. 1725 of Act 2657, *supra*, makes similar provision for the case of judgments recovered against Philippine collectors.

The analogies indicated bring into perfect application the decisions of this Court and of inferior Federal Courts to the effect that the immunity of the Government from payment of interest does not prevent such recovery in an action against the collector, and that interest is none the less allowable because the judgment is payable out of the Treasury. Erskine v. Van Arsdale, 15 Wall., 68; Patton v. Brady, 184, U. S. 608; National Home v. Parrish, 229 U. S. 494; Sage v. United States, 250 U. S. 33; White v. Arthur, 10 Fed. 80; McClain v. Pennsylvania Co. 108 Fed. 618; Conant v. Kinney, 162 Fed. 581; State Line v. Davis, 228 Fed., 246; New York L. I. Co. v. Anderson, 263 Fed. 527.

The principle applies *a fortiori* in the Philippine Islands because Section 1725, *supra*, provides for the payment of "judgment, damages, or costs," and has been construed by the Philippine Supreme Courts to cover specifically the award of interest.

> " 'Damages' for the wrongful exaction or withholding of money is the payment of interest at the

legal rate. (Art. 1108 Civil Code.)" H. E. Heacock & Co., v. Insular Collector, 37 Phil. 970, 982.

The decision of the Philippine Supreme Court awards interest, and the opinion cites as authorities for such award the Erskine and National Home cases, *supra*, as well as Art. 1108 of the Civil Code and sec. 144 of the Internal Revenue Law of 1914 (Act. 2339), which is identical with sec. 1725, *supra*. The decision involves only the construction and application of local law, and is, of course, very persuasive. Villanueva v. Villanueva, 239 U. S. 293.

Section 1721 of Act 2657 Governs.

These actions are brought against the Collector of Internal Revenue in his official capacity. If, as contended by petitioner, they are substantially against the Philippine Government, nevertheless interest should be allowed. As pointed out, *supra*, the causes of action accrued, and the actions were brought when Sections 1721 and 1725 of Act 2657 were in force. These two sections became sections 1579 and 1583, respectively, in Act 2711, which went into effect October 1, 1917, the only change being that the words "without interest" were added in Section 1579.

The Philippine Supreme Court unanimously decided respondents were entitled to interest. They followed their decision on this subject in the case of Smith, Bell & Co., Ltd. vs. James J. Rafferty, pending here as No. 138. As far as interest is concerned, the instant cases are identical with the Smith, Bell & Co. case. In that decision the Court cited, *inter alia*, the cases of H. E. Heacock Co. v. Insular Collector, and Hongkong & Shankhai Banking Corporation v. Rafferty, *infra*, which hold that interest must be allowed under Sec. 1721 of Act 2657. Thus, the Philippine Supreme Court is unanimous in holding that if the action is substantially against the Government, it is con-

trolled as to allowance of interest, by the Administrative code of 1916.

In the *Heacock* case, 37 Phil. 982, the action was against the Collector of Customs to recover import duties, and the provisions of the internal-revenue law did not directly apply; it was held, however, on general principles, that interest was recoverable from the government in the absence of express limitation in the waiver of immunity, and the Court pointed out, by way of analogy, that sec. 144 of Act 2339 (identical with sec. 1583 of Act 2711) specifically provided for the payment of interest awarded in suits against internal-revenue officers.

In the *Hongkong Bank* case, 39 Phil. 145, a judgment had been rendered in first instance against the Collector of Internal Revenue for the recovery of sums unduly exacted as internal-revenue taxes. Pending review on appeal, the Administrative Code of 1917 came into force with the denial of interest of sec. 1579. The Court, reserving the question of the construction of sec. 1579 in other respects, held that it was not intended to operate upon rights accrued, and that plaintiff was entitled to interest under the corresponding section of the earlier laws. In the recent case of *Palanca* v. *City*, XVIII Official Gazette, No. 89, p. 2725, the Philippine Supreme Court cites and follows the Hongkong Bank Case.

The exports were made by respondents not only under the assurance of sec. 11 of the Autonomy Act, but under the guaranty of the internal-revenue law then in force that undue exactions of internal-revenue officers might be recovered with legal interest. The construction of sec. 1579 of Act 2711 whereby it is applied only to an action concerning taxes collected under the Code of which it is a part, is a fair and reasonable construction, avoids hardships and injustice, and saves a conflict with constitutional

limitations. Such construction by concurrence of all the Justices of the Philippine Supreme Court can hardly be questioned.

VI

The equities of the case are all with Respondents

Petitioner, on page 52 of his brief, admonishes that the equities of the case should be inquired into, and adds

> "The respondents in the instant cases added to the price of their merchandise the amount of the percentage taxes which they paid to the government."

In this Petitioner is mistaken. There is not a word in the record to justify it. There couldn't be, because exactly the contrary is the fact. By reference to the chronology pp. VI-IX herein, it will be observed that for a time the merchants' tax was refunded when goods were exported. In other words, exports were exempt; this because it was thought the subject of export and import duties was one exclusively within the jurisdiction of Congress. This exemption was attempted to be removed by Act 2541, December, 1915, effective January 1, 1916. Doubtless during that early part of 1916 respondents, like other merchants, did add the tax to the price, but soon thereafter, to wit, August 29, 1916, Congress passed the Autonomy Act, reorganizing the Philippine Government. It was a solemn, comprehensive, enactment, among other things defining the powers of the Philippine Legislature. It is the final expression of Congress establishing government in the Philippines. It was matured by the years of previous experience, and the deliberations of Congress extending over a long period of time. During three years, 1913 to 1916, this Bill was constantly before Congress or a committee thereof. It

was the subject of daily discussion in the Philippines, in the press and among the citizens. One of the most carefully matured features of the Bill,—one Congress insisted upon inserting in the most determined manner, was sec. 11, which said:

> "No export duties shall be levied or collected on exports from the Philippine Islands."

This solemn declaration of Congress everybody thought was the last word. Accordingly, respondents, like other merchants in export business, understood that export taxes would no longer be charged, and they considered this in making prices at foreign ports in competition with the world. In other words, they thought this tax no longer existed, and they did not add it to their prices. To assume that respondents did not expect Congress to make good its word is grotesque. To assume that, notwithstanding this express prohibition of Congress, a Philippine tax collector could retain such a tax, is equally grotesque. Respondents thought no export tax could or would be upheld, so made no provision for such tax when the goods were sold.

Even if respondents had shifted the burden by covering the percentage taxes in the prices of its exports, no equities would arise from that fact to aid the petitioner. The "ultimate consumer" is not a party to this action, and we are concerned only with the comparative equities of petitioner and respondents. If petitioner, or the Philippine Government, may plead in excuse of an unlawful spoliation of respondents that the latter have been able to retrieve their losses, then any debtor may urge as a defense that the creditor has made due provision for bad accounts.

It may not be out of place here to observe that business has, during recent years, been subjected to tax burdens almost beyond its strength to bear, this in the normal course of things. But what a remarkable situation is presented by

the claim that Congress in 1920 by a retroactive statute imposed a tax burden on the years 1916 and 1917—a tax which Congress had expressly promised business should never have to bear! Tell burdened business in 1920 it must lose property illegally seized for taxes four and three years before! Such a construction is repugnant to every sense of justice. It violates fair play between government and citizen. It destroys private rights, which is tyranny, and divests citizens of that reasonable protection under the law required by modern society.

Surely Congress cannot be presumed to have intended any such thing. Rather attribute to Congress fair and just dealing, and assume, as reason requires, that it ratified only those taxes collected prior to the Autonomy Act.

SUMMARY

Respondent contends that:

1. The taxes in question were export taxes, because levied on the value of goods exported, and, in effect, are admitted to be such.
2. They were prohibited by Congress in the Autonomy Act of August 29, 1916, and therefore were illegally collected.
3. The only ratifying statute at all applicable, is that of June 5, 1920, which must be construed to have legalized only the taxes collected before the Autonomy Act, and not those for which respondents secured judgments. If it be held that Congress intended to legalize the taxes for which respondents secured judgments then that act is null and void, in that it attempts to take property without compensation and without due process of law.
4. The judgment of the Philippine Supreme Court is conclusive respecting the interpretation of local laws governing interest; and, in any event, the decision of that court in the matter of interest

involved herein, is, in all respects, according to law and precedent, because

a. The cause of action arose and was begun under a law permitting interest.
b. Respondents must be allowed interest or they will be denied adequate remedy for the injury sustained. Private property will have been taken for an alleged public use without due compensation.

Therefore, it is respectfully submitted that the judgments of the Philippine Supreme Court herein should be affirmed.

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In the Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 138

JAMES J. RAFFERTY, AS COLLECTOR OF INTERNAL REVENUE FOR THE PHILIPPINE ISLANDS, *Petitioner*,

v.

SMITH, BELL & COMPANY, LIMITED, *Respondent*.

No. 140

JAMES J. RAFFERTY, AS COLLECTOR OF INTERNAL REVENUE FOR THE PHILIPPINE ISLANDS, *Petitioner*,

v.

COMPANIA GENERAL DE TABACOS DE FILIPINAS, *Respondent*.

No. 142

JAMES J. RAFFERTY, AS COLLECTOR OF INTERNAL REVENUE FOR THE PHILIPPINE ISLANDS, *Petitioner*,

v.

VISAYAN REFINING COMPANY, *Respondent*.

PETITIONER'S REPLY BRIEF

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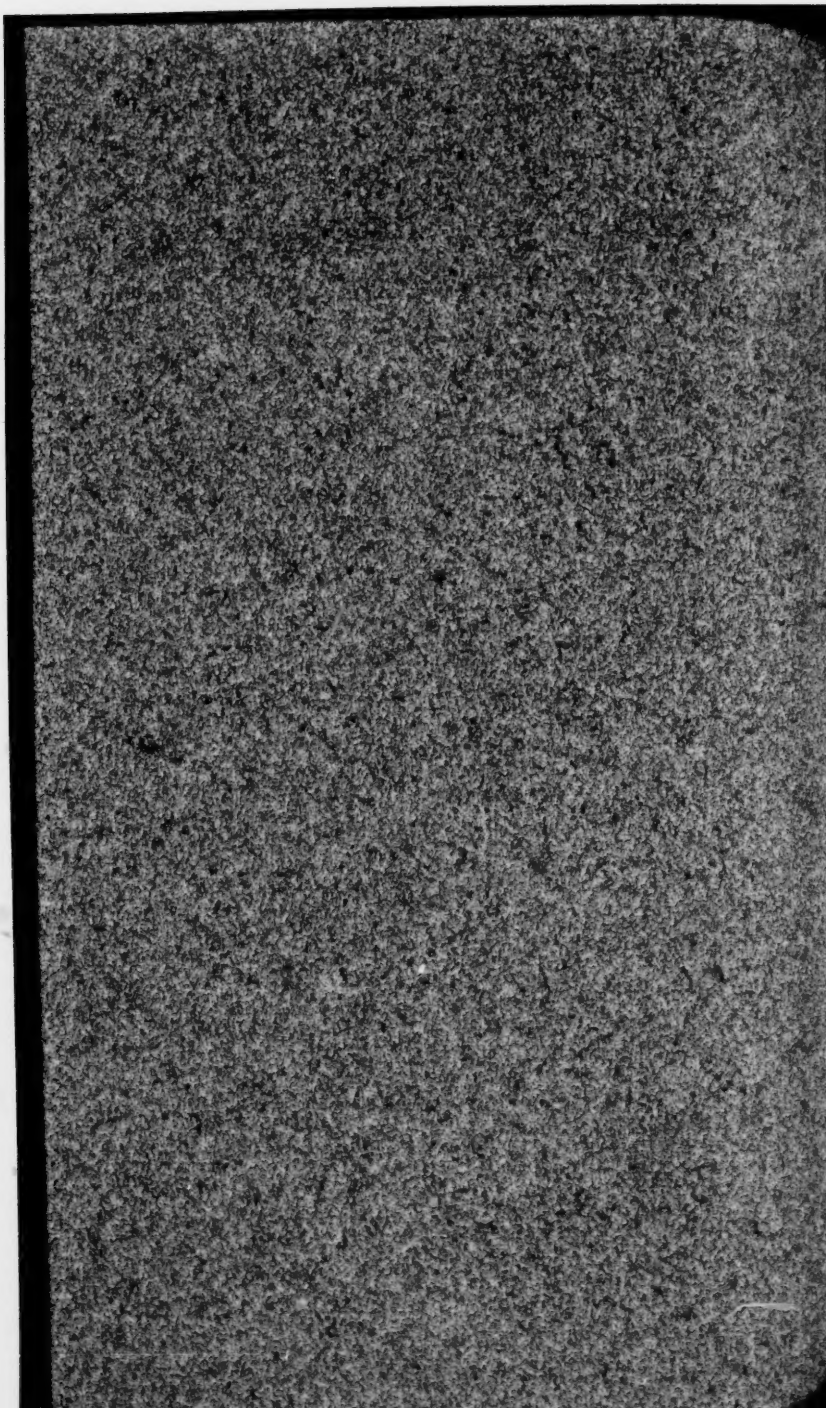

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PETITIONER'S REPLY BRIEF

THE THEORY UPON WHICH THE CASES WERE INSTITUED AND TRIED.

The only justification for the presentation of this reply brief is the fact that respondents have declined to accept our suggestion that:

> "As these actions were commenced and prosecuted against the Collector of Internal Revenue for the Philippine Islands and not against the person who held or who is now holding that position in his individual or private capacity, it is agreed by counsel for all the parties that the substitution of the name of the present Collector of Internal Revenue for that of James J. Rafferty may be considered as having been duly made."

Upon this question counsel, in Case No. 138, says:

> "This action was commenced and prosecuted against James J. Rafferty in his personal capacity —not against the Philippine Government nor against its Collector of Internal Revenue as such. Therefore, respondent has not agreed, and does not agree, to the substitution suggested by petitioner in the first paragraph of his brief."

Again, counsel says that "In this case the suit is against James J. Rafferty, an individual. It involves only the liability of the Collector" (page 14). "The Philippine Legislature could not relieve the petitioner of his personal obligation to make good the damage resulting from his unauthorized acts" (page 29). "If, however, it (Section 1579 of Act No. 2711), is so construed as to govern an action to enforce the personal obligation of the petitioner, * * *, Section 1579 contravenes the Autonomy Act" (page 30). "That this action is against

James J. Rafferty personally under the Civil Code, and not against the Collector of Internal Revenue in his official capacity under the authority of the Administrative Code, appears from the pleadings and from the decisions of the Philippine Courts" (page 34, 35). "That the indirect interest of the Philippine Government arising from its undertaking to pay the judgment herein is not a sufficient reason for an exception to the general rule, appears from the terms of Section 1583 of Act 2711 (and its prototype in preceding codes), which specifically authorizes the payment of costs awarded in suits against internal revenue officers" (page 40). "The judgment is against an individual and not a government" (page 43).

Turning now to the brief in cases Nos. 140 and 142, we find counsel saying and urging that:

> "This action was commenced and prosecuted under the Philippine Code of 1916. Section 1721 provides for the action, and in case of judgment, Section 1725 provides for its payment by the Collector of Internal Revenue. Under the circumstances, James J. Rafferty, defendant below, petitioner here, should be continued. Therefore, respondents cannot and do not consent to the substitution proposed by petitioner on p. 1 of his brief."

Again, he says, "If, however, it (Section 1579 of Act No. 2711) is so construed as to apply to an action to recover sums exacted under the authority of a former law, superseded by Act 2711, which authorized recovery with interest, Section 1579 contravenes the Autonomy Act" (page 37). "These cases are governed by Section 1721 of Act 2657, the Administrative Code of 1916, in force when the taxes were collected and when the suits were brought, * * *" (page 39)." *These actions are brought*

against the Collector of Internal Revenue in his official capacity (Italics ours). If, as contended by petitioner, they are substantially against the Philippine Government, nevertheless interest should be paid" (page 42). "The cause of action arose and was begun under a law permitting interest" (page 47).

Sections 1721 and 1725 of Act No. 2657 were in force when the taxes were collected and when the suits were brought in cases Nos. 140 and 142 and when the taxes were collected in Case No. 138. Section 1721 was amended by Section 1579 of Act No. 2711, effective October 1, 1917, by inserting the words "without interest." This section as thus amended was in force at the time Case No. 138 was instituted. Act No. 2711 only changed the number of Section 1725 without amending it.

For the purpose of making clear the theory upon which the cases were instituted and tried, let us assume that there is a marked difference, both in the cause of action and the results flowing therefrom, in suits brought under Section 1721 of Act No. 2657 or Section 1579 of Act No. 2711 and those brought under the Civil Code, the judgments in which may be paid by the Collector of Internal Revenue in accordance with Section 1725 of Act No. 2657 or Section 1583 of Act No. 2711; or in other words, let us say that the former are in law and in fact suits against the Philippine Government, the Collector being only a nominal party, while the latter are suits against the revenue officer in his personal capacity. We will attempt to show under the next subheading that this is legally true.

It is quite clear that Sections 1721 of Act 2657 and Section 1579 of Act 2711 are only applicable in cases wherein (a) the validity of any tax is questioned; or (b) wherein the amount of the tax is disputed; or (c) wherein other questions are raised as to liability therefor. It is

likewise clear that in order to maintain a suit under either section the taxpayer must show (1) that he paid the tax under protest; (2) that he requested the decision of the Collector thereon; (3) that the decision of the Collector was either adverse to his contention or delayed for six months; and (4) that he brought his action within two years after payment of the tax.

An examination of the printed records will show that in each case the validity of the tax was questioned; that the tax was paid under protest; that the decision of the Collector was adverse as shown by his refusal to return the amount; and that the suit was brought within the statutory period. The complaints in each case are essentially the same and the decisions of the lower courts rest upon the same legal principles. The two main questions were raised in each case; viz., was the tax a duty on exports? Was the tax ratified by Congress? The three dissenting justices as to costs in Case No. 138 took it for granted that the suit was against the Philippine Government. Before the institution of these proceedings we cannot find where any one even questioned the fact, if it be a fact, that these cases were instituted and tried under the above-mentioned section of the Administrative Code providing for the recovery of taxes illegally assessed or collected and which were paid under protest. We are, therefore, unable to follow counsel in his reasoning wherein he attempts to show that Case No. 138 is a suit against the petitioner, James J. Rafferty, personally, and that the Philippine Government obligated itself by the enactment of Section 1583 of Act No. 2711 to pay the judgment, together with interest and costs, while at the same time insisting that cases Nos. 140 and 142 are governed by Section 1721 of Act No. 2657.

The Scope and Meaning of Sections 1579 and 1583 of Act No. 2711, Being Sections 1721 and 1725 of Act No. 2657.

Sections 1579 and 1583 of Act No. 2711, being Sections 1721 and 1725 of Act No. 2657 with the addition of the term "without interest" in Section 1579, read as follows:

> "Sec. 1579. *Recovery of tax paid under protest.* When the validity of any tax is questioned, or its amount disputed, or other question raised as to liability therefor, the person against whom or against whose property, the same is sought to be enforced, shall pay the tax under instant protest, or upon protest within ten days, and shall thereupon request the decision of the Collector of Internal Revenue. If the decision of the Collector of Internal Revenue is adverse, or if no decision is made by him within six months from the date when his decision was requested, the taxpayer may proceed, at any time within two years after payment of the tax, to bring an action against the Collector of Internal Revenue for the recovery without interest of the sum alleged to have been illegally collected, the process to be served upon him, upon the provincial treasurer, or upon the officer collecting the tax."
>
> "Sec. 1583. *Satisfaction of judgment recovered against treasurer or other officer.* When an action is brought against any revenue officer to recover damages by reason of any act done in the performance of official duty, and the Collector of Internal Revenue is notified of such action in time to make defense against same, through the Attorney-General, any judgment, damages or costs recovered in such action shall be satisfied by the Collector of Internal Revenue upon approval of the Department head, or if the sum be paid by the person sued, shall be repaid or reimbursed to him.

"No such judgment, damages, or costs shall be paid or reimbursed in behalf of a person who has acted negligently or in bad faith, or with wilful oppression."

These sections appear under the article in the Administrative Code entitled "Remedies in general." Section 1578 (formerly Section 1720), which provides that "no court shall have authority to grant an injunction to restrain the collection of any internal-revenue tax" is in the same article. Section 1578 is not in conflict with the Organic Laws. *Churchill* v. *Rafferty*, 32 Phil. Rep. 593.

Counsel, at pages 32 and 33 of his brief in Case No. 138, lays down these propositions:

"(1) The aggrieved taxpayer has a special action, substantially against the Government, under the authority of Section 1579 of Act 2711, or the corresponding sections of preceding codes; and he has his action against the collector personally upon the quasi-contractual obligation arising from the receipt of what is not due, defined in Articles 1895-1901 of the Civil Code.

"(2) But the establishment of this special remedy has not precluded the taxpayer's right to sue personally the officer who exacted the undue payment, whether the chief of the bureau or another. As the United States Revised Statutes, Section 989, recognizes the personal liability of collectors and provides for their protection against personal judgments, so Section 1583 of Act 2711 makes similar provisions for the case of personal judgments recovered against Philippine collectors."

We agree that the aggrieved taxpayer has his right of action against the Collector as the nominal party and against the Philippine Government as the real party in interest under Section 1579 to recover any tax paid under

protest wherein the validity of such a tax is questioned, or its amount is disputed or other questions raised as to the liability therefor. And we go further and urge as a sound legal proposition that that right of action or remedy is absolutely exclusive of all other remedies available to the taxpayer for the recovery of such taxes which can result in placing the Philippine Government under any obligation to refund the taxes so paid. Or in other words, the only remedy which the respondents have to recover back from the Philippine Government the taxes in question is that provided for in Section 1579 of Act 2711, formerly Section 1721 of Act 2657. By the enactment of these sections, the government waived its immunity and permits itself to be sued under the limitations stated therein. Unless it affirmatively appears that the validity of the tax is questioned, or its amount is disputed or some other question is raised as to the liability therefor; that the tax was paid under protest; and that the Collector was given an opportunity to pass upon the complaint, the dissatisfied taxpayer cannot hope for recovery. These are the stated conditions and they must be complied with.

The duty of determining the validity of a tax, which can only be done by passing upon the constitutionality of the statute under which the tax is levied and collected, is essentially a judicial function and whether the duty of determining the proper amount to be paid and all questions touching the liability of the particular person therefor is likewise essentially a judicial function and of no importance, because such has been expressly made so by Section 1579, *supra*.

Section 989 of the Revised Statutes of the United States, cited and relied upon by counsel for respondents to support the proposition that the Philippine Government is obligated to pay judgments in suits brought under Sec-

tion 1583, *supra,* for the return of taxes paid under protest, reads as follows:

> "When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector, or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the appropriation from the Treasury."

That the subject matters covered by Sections 1579 and 1583, *supra,* of the Philippine Statute are covered by R. S. 989 clearly appears from the language of the latter. If the cause of action is for the recovery of any money exacted by or paid to the collector or other officer of the revenue and by him paid into the Treasury, in the performance of his official duty, the court *must* grant a certificate of probable cause; but in the other class of cases, it is within the sound discretion of the court whether or not the certificate should be granted. To this extent and in this manner only, R. S. 989 and the cases cited are applicable to the questions raised upon this branch of the cases.

There is no relation between Section 1579 and 1583. They are entirely disassociated. They create two distinct remedies, dealing with separate and distinct subjects. The first relates exclusively to actions for the recovery of taxes paid under protest. The second, Section 1583, relates to official wrong-doing generally. The

Government assumes no obligation under Section 1583 if it be shown that the officer "acted negligently or in bad faith, or with willful oppression."

While it is true that the collection in good faith of a sum of money as a tax under a void statute, or an excess amount, or from one who does not owe it, under color of authority, will damage the person who is forced to pay the same, yet such damages do not come within the scope of the term "to recover damages by reason of any act done in the performance of official duty" found in section 1583, *supra*. This section includes only judgments, damages, or costs in actions against revenue officers for acts done in the execution of the Internal Revenue Law which may form the basis for actions under the Civil Code. The examination of Chapter 40 of Act No. 2711, which amended the Administrative Code in certain particulars, will disclose that the powers and duties of the Bureau of Internal Revenue are very broad and comprehensive (Section 1423); that the Collector and other revenue officers are authorized to make arrests and seizures for the violation of any penal law or regulation administered by the Bureau of Internal Revenue (Section 1434); that they are authorized to administer oaths and to take testimony (Section 1436); that the Collector is authorized to remove any sign, sign board, or billboard if it "*is offensive to the sight* or is otherwise a nuisance" (Section 1477); that revenue officers are empowered to destroy defective instruments of weights and measures (Section 1531); that they may enter any house, building, or place where articles subject to tax are produced or kept (Section 1571); that they may detain any package containing or supposed to contain articles subject to a specific tax (Section 1572); that they may seize, sell or destroy specific personal forfeited property (Section 1585); that they

may seize and sell personal property for the payment of delinquent taxes (Section 1590). There are many other powers and duties conferred upon revenue officers. It is the judgments, damages, or costs resulting from the performance of these and kindred official duties which the government authorizes in Section 1583, *supra*, the Collector to pay "upon approval of the Department head." The words "upon approval of the Department head" confers a discretionary power upon that official and he may approve or withhold approval of the judgment, *or* damages *or* costs as he may see fit. He may approve the one and disapprove the other. The main purpose of Section 1583 is to protect the revenue officers from financial loss resulting from the performance of official duties in good faith and not to protect the injured citizen as he has his remedy against the officer personally.

PROPOSED SUBSTITUTION AUTHORIZED.

The substitution of the present Collector of Internal Revenue as suggested in our brief is authorized by Section 110 of the Philippine Code of Civil Procedure provided that it be held that the Collector is only a nominal party. If we had any doubt as to the final disposition of these cases by this court, we would not question the contention of counsel that the substitution should not be made for the reasons stated by him, because if the cases are disposed of upon that theory neither the Philippine Government nor James J. Rafferty will be injured thereby. The Philippine Government is under no obligation to pay any judgment, damages, or costs, under Section 1583, *supra*, in cases wherein aggrieved taxpayers are suing to recover taxes paid under protest. A Collector of Internal Revenue will not be held personally liable for the collection of an *excise* tax under color of authority where it ap-

pears, as in the instant cases, that he acted in good faith and that the aggrieved taxpayer has a plain and adequate remedy against the Government by its consent.

We respectfully suggest that our proposal to substitute may now be considered as a pending motion and disposed of accordingly.

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Of Counsel,
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RAFFERTY, COLLECTOR OF INTERNAL REVENUE FOR THE PHILIPPINE ISLANDS, *v.* SMITH, BELL & COMPANY, LIMITED.

SAME *v.* COMPANIA GENERAL DE TABACOS DE FILIPINAS.

SAME *v.* VISAYAN REFINING COMPANY.

CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

Nos. 138, 140, 142. Argued November 10, 1921.—Decided December 5, 1921.

1. Taxes on the value of exports from the Philippine Islands collected under a Philippine Act, effective July 1, 1916, while duties on such exports were forbidden by the Act of Congress of August 29, 1916, c. 416, 39 Stat. 545, were legalized, ratified and confirmed by the congressional Act of June 5, 1920, c. 253, 41 Stat. 1015, 1025. P. 231.
2. This was within the power of Congress (*United States* v. *Heinszen & Co.*, 206 U. S. 370,) even where the parties taxed had obtained judgments for restitution, in the Supreme Court of the Philippines, before the date of the ratifying statute but where the judgments at that date were still reviewable and subsequently were reviewed in this court by certiorari. P. 232.

40 Phil. Rep. 691, reversed.

CERTIORARI to the Supreme Court of the Philippine Islands for the review of judgments of that court holding illegal the collection of certain taxes and ordering the Col-

lector of Internal Revenue for the Islands, defendant below, to refund them to the present respondents.

Mr. Grant T. Trent, with whom *Mr. Cassius M. Dowell* was on the briefs, for petitioner.

Mr. Clarence B. Miller, with whom *Mr. W. H. Lawrence*, *Mr. J. G. Lawrence* and *Mr. Frederick C. Fisher* were on the briefs, for respondents.

The transactions involved were exports.

The taxes in question were not legalized by the Act of Congress of July 1, 1916, 39 Stat. 286; nor by the Act of June 4, 1918, 40 Stat. 597.

The Act of Congress of June 5, 1920, 41 Stat. 1025, can not have the effect of confiscating the judgments under review. The Smith, Bell & Company case was commenced in the Court of First Instance of Manila in February, 1918; in July, 1918, that court ordered the entry of judgment; both parties appealed; the Philippine Supreme Court entered its judgment in March, 1920. The Compania General case was commenced in the Court of First Instance January 23, 1917; judgment in favor of respondent was rendered November 26, 1917; both parties appealed to the Supreme Court and judgment there was given in favor of respondent March 16, 1920. The Visayan Refining Company case was commenced in the Court of First Instance on January 20, 1917; judgment in favor of respondent was entered by that court on November 26, 1917; both parties appealed to the Supreme Court and judgment there was given in favor of respondent March 18, 1920. By these judgments respondents became entitled to recover from petitioner the amounts which the petitioner had exacted as taxes under the ostensible authority of § 1614, Act No. 2657.

The decisions upholding retrospective statutes to cure irregularities as against claims not reduced to judgment, of which many are quoted or cited by petitioner, do not

require particular notice. All are distinguishable in that they do not involve the overthrow of judgments, and most of them present other obvious and vital differences that make them inapplicable herein. None of them goes so far toward being in point as *United States* v. *Heinszen & Co.*, 206 U. S. 370, and if that case is not controlling, all the others fall with it.

The proposition that a statute may divest rights established by a judgment is so abhorrent to our fundamental principles and to natural justice, as well as to familiar constitutional limitations, that there are few instances in our jurisprudence where the attempt has been made and passed upon. Nevertheless, there is plain condemnation of the theory in the decisions of this court. *McCullough* v. *Virginia*, 172 U. S. 102, 103; *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 478; *Pennsylvania* v. *Wheeling Bridge Co.*, 18 How. 421, 431; *Haley* v. *City*, 68 Pa. St. 45; *Taylor* v. *Place*, 4 R. I. 337; *Sanders* v. *Cabaniss*, 43 Ala. 184; *Lawson* v. *Jeffries*, 47 Miss. 702; *Griffin* v. *Cunningham*, 20 Gratt. 54. While *United States* v. *Heinszen & Co.* holds that a congressional ratification may destroy a mere right of action, practically overruling in this respect *DeLima* v. *Bidwell*, 182 U. S. 1, yet the reasoning, by distinction, compels the conclusion that a claim reduced to judgment is immune.

The immunity of respondents' judgments from legislative confiscation does not depend upon their finality in the sense of not being subject to judicial review. If the interposition of this court had the effect of vacating the judgments and bringing the causes here to be tried *de novo*, the case might, arguably, be different; but, upon the allowance of the writ, the judgment is reviewed "as if brought up by writ of error," and it is precarious only to the extent that error may be found. If the judgment is declared free from error, its affirmance by this court will in no way enhance its value or change its character. The ultimate

question is whether the judgments are "property" of respondents, such as may not be taken without due process; the review herein is an examination of respondents' title to the property—not a proceeding from which such title may arise. A judgment creditor in a case reviewable for error may be divested of his property in the judgment, but only by "due process of law"—which judicial reversal is, and legislative confiscation is not.

There is a fundamental difference between the ratification sustained in the *Heinszen Case*, and the ratification asserted by petitioner herein, in that the one supplied a mere absence of prior authority, while the other is invoked to cure an express denial of authority. This difference is inferentially recognized in the *Heinszen* opinion, p. 382.

It is obvious that where the principal has denied authority to his agent and third parties have relied upon such denial, the principal may not thereafter retroactively give validity, in prejudice of such third parties, to acts of the agent in contumacious exercise of the power denied.

The distinction is clear between an act of Congress withdrawing the Government's consent to be sued, and an act which pretends to relieve one individual from his judgment debt to another.

Respondents' vested rights in their judgments are analogous to vested rights secured by exemption from taxation. *Choate* v. *Trapp*, 224 U. S. 665; *Ward* v. *Love County*, 253 U. S. 17.

Even in the Philippine Islands no person may "be deprived of life, liberty or property without due process of law."

From a misunderstanding of the Insular Cases and certain subsequent decisions of this court there has arisen a wide-spread belief that Congress has power unlimited to legislate for the Insular Possessions. This belief has no foundation in the decisions of this court, and none in principle.

If there is no decision of this court affirmatively applying any guaranty or limitation of the Constitution in the Philippine Islands or Porto Rico, the reason is plain; the occasion has not arisen.

In cases wherein insular legislatures have encroached upon personal rights, the decisions have been based upon the guaranties of congressional organic laws, and the court has avoided as unnecessary determining whether the corresponding provisions of the Constitution would have been applicable. *Kepner* v. *United States*, 195 U. S. 100, 124.

On the other hand, the power of Congress over the Insular Possessions is derived from the same provision of the Constitution—Art. IV, § 3, par. 2—which supported the jurisdiction of Congress in the Territories which later became States. And it has been held that in legislating for those Territories Congress was not wholly exempt from constitutional limitations.

It has been held that the uniformity clause of Art. 1, § 8, does not apply to duties imposed by Congress in the Possessions, because the section requires uniformity only "throughout the United States," and the Possessions are not a part of the United States. *Downes* v. *Bidwell*, 182 U. S. 224, 262. But in that case even the majority of the court conceded that the Constitution contains limitations which operate upon the power of Congress wherever exercised. See also, *Hawaii* v. *Mankichi*, 190 U. S. 197; *Dorr* v. *United States*, 195 U. S. 138.

The grounds of dissent in the Insular Cases show that all of the Justices were agreed that the "general prohibitions" in support of "natural rights" limited the power of Congress to legislate for the Possessions.

Among these effective limitations is certainly that of the Fifth Amendment. *Fletcher* v. *Peck*, 6 Cr. 87.

The ratification by Act of June 5, 1920, covers only the period between July 1 and August 29, 1916.

If petitioner's collection of the taxes was unlawful, the award of interest was not error.

This is not an action against the Government.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

These cases turn upon the same question and were argued together. In our view they can be disposed of by applying the Act of Congress, approved June 5, 1920, c. 253, 41 Stat. 1015, 1025, without passing upon any other point.

Acting under ostensible authority of § 1614, Act 2657, Philippine Legislature, approved February 24, 1916, and effective July 1 thereafter, the Collector of Internal Revenue for the Philippine Islands levied and collected the taxes here challenged upon the value of certain commodities exported from those Islands by respondents between October 1, 1916, and September 30, 1917.

The Supreme Court of the Islands gave judgments for the respondents during March, 1920. Petitions for writs of certiorari filed here in September thereafter and within time prescribed by law, were allowed. Act of Congress, approved September 6, 1916, c. 448, 39 Stat. 726.

Section 1614, Act 2657. "All merchants not herein specifically exempted shall pay a tax of one per centum on the gross value in money of the commodities, goods, wares, and merchandise sold, bartered, exchanged, or consigned abroad by them, such tax to be based on the actual selling price or value at which the things in question are disposed of or consigned, whether consisting of raw material or of manufactured or partially manufactured products, and whether of domestic or foreign origin. . . ."

Section 11, Act of Congress, approved August 29, 1916—Autonomy Act—c. 416, 39 Stat. 545. "That no export duties shall be levied or collected on exports from the Philippine Islands, but taxes and assessments on

property and license fees for franchises, and privileges, and internal taxes, direct or indirect, may be imposed for the purposes of the Philippine government and the provincial and municipal governments thereof, respectively, as may be provided and defined by acts of the Philippine Legislature, and, where necessary to anticipate taxes and revenues, bonds and other obligations may be issued by the Philippine government or any provincial or municipal government therein, as may be provided by law and to protect the public credit. . . ."

The Act of Congress, approved June 5, 1920, *supra*, provides: "The taxes imposed by the Philippine Legislature in section 1614 of the Act Numbered 2657, enacted by that body on February 24, 1916, are legalized and ratified, and the collection of all such taxes made under or by authority of such Act of the Philippine Legislature is legalized, ratified, and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

We think the language last quoted was intended to apply to the taxes collected from respondents, here called in question, and that it is sufficiently broad to include them. That the enactment is within the power of Congress necessarily follows from the doctrine announced in *United States* v. *Heinszen & Co.*, 206 U. S. 370, 386, *et seq.*

The judgments below were subject to review here and the mere fact that the causes had proceeded to such stage gave respondents no higher rights than those possessed by Heinszen & Company, whose action to recover, although instituted prior to the passage of that enactment, was held to have been barred by the Act of June 30, 1906, c. 3912, 34 Stat. 636.

The judgments of the Supreme Court so far as adverse to Rafferty, the Collector, must be reversed and judg-

nents entered here in his favor but without any allowance for costs either in this court or in the courts below.

Reversed.

MR. JUSTICE CLARKE concurs in the result.